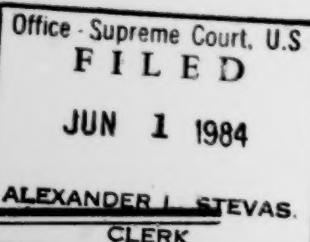


83-1985

No.



In the Supreme Court of the
United States

Term, 198

MARK DAVID FIELD,

Petitioner

v.

OMAHA STANDARD INC., SAVAGE TRUCK
EQUIPMENT COMPANY, INTERNATIONAL
HARVESTER COMPANY,

Respondents

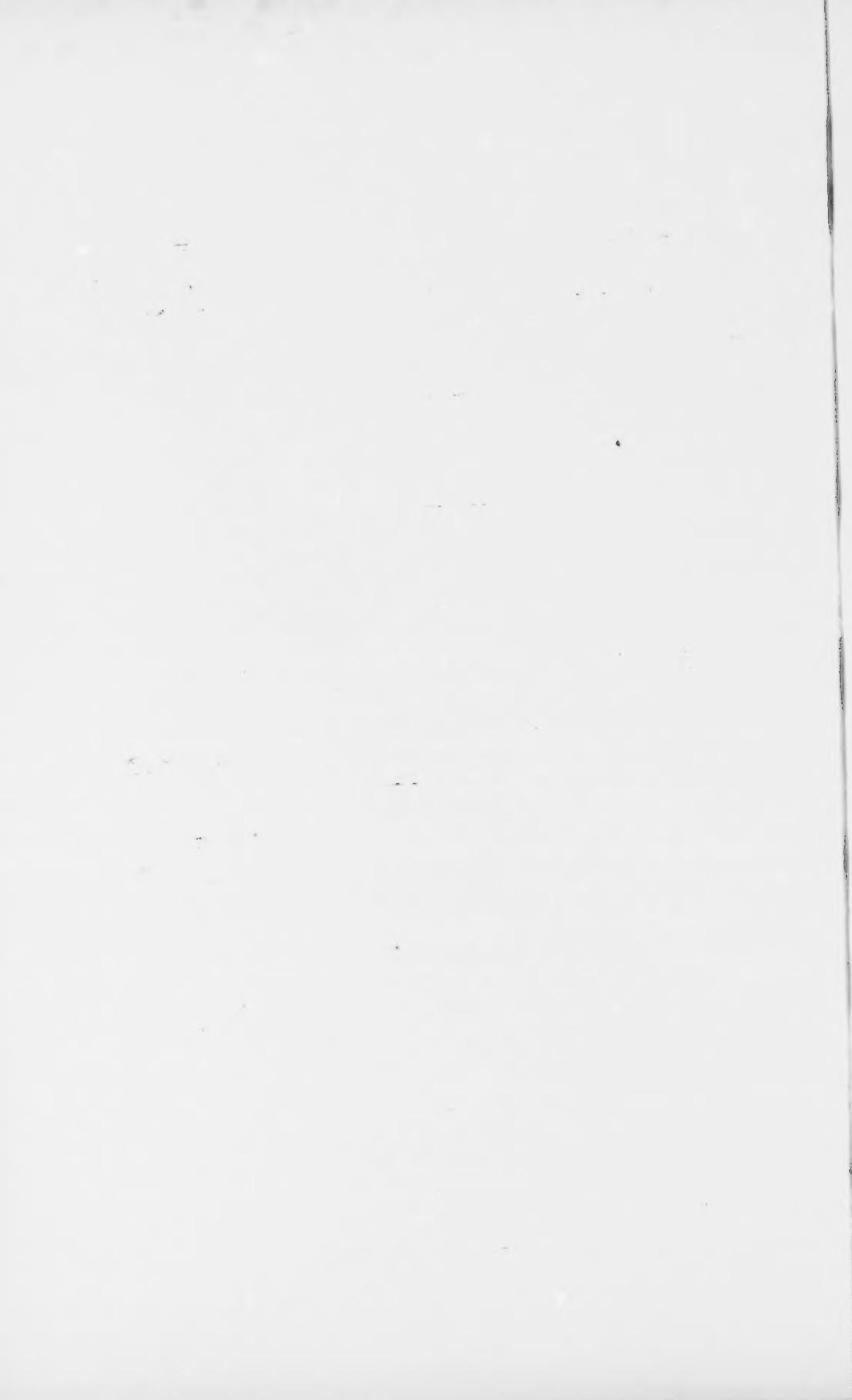
**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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Question Presented

QUESTION PRESENTED

Did the Third Circuit *fail to follow the substantive law* of Pennsylvania when in a *diversity products liability* case it affirmed the trial court which:

Admitted evidence and charged the jury to *compare the conduct* of the parties in the manufacturing and distribution chain and to *limit liability* for a defective product to the *most culpable* party?

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Contents	ii
Opinions Below	1
Jurisdiction	2
Statutory Provisions	2
Statement of the Case	4
Reasons for Granting the Writ:	
A. 28 U.S.C. §1752 as Interpreted by Your Court in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and Guaranty Trust Co. v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) and Their Progeny Compel District Courts Sitting in Diversity Cases To Follow the Substantive Law of the States Where They Sit	8
B. The Holding of Verge v. Ford Motor Company Which Compares the Conduct of the Parties Within the Chain of Manufacturing Distribution of a Product and Limits Liability for a Defective Product to Only One Party Within the Chain Is Not Consistent With the Basic Principles of §402A as Interpreted by the Courts of Pennsylvania	11
1) Verge announced a balancing test involving various suppliers that has no basis in the Restatement or the cases cited in Verge	11
2) Verge is not in keeping with the language, comments and philosophy of Restatement of Torts (Second) §402A	15

3) Verge misinterprets the cases cited for support and announces a comparison procedure not present in any of the cases. Furthermore, some of the principles expressed are of doubtful current legal validity	25
4) Verge does not comport with product liability principles expressed in Pennsylvania appellate cases and those expressed in most jurisdictions which have adopted Restatement of Torts (Second) §402A	30
Conclusion	37

APPENDIX:

Exhibit A—Memorandum, U.S. District Court, E.D. Pa., June 23, 1983	1a
Order	24a
Exhibit B—Judgment Order, U.S. Court of Appeals	25a
Exhibit C—Order, U.S. Court of Appeals sur Petition for Rehearing	27a
Exhibit D—Verge v. Ford Motor Company	29a

TABLE OF CITATIONS

CASES:

Abdul-Warith v. Arthur G. McKee and Co., 488 F. Supp. 306 (E.D. Pa. 1980), aff'd, 642 F.2d 440 (3d Cir. 1981)	21
Azzarello v. Black Bros. Co., Inc., 480 Pa. 547, 391 A.2d 1020 (1978)	11, 18, 19, 32
Baker v. Outboard Marine Corp., 595 F.2d 176 (3d Cir. 1979)	9

Becker v. Interstate Properties, 569 F.2d 1203 (1977)	9, 10
Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975)	11, 34
Bexiga v. Havar Manufacturing Corp., 60 N.J. 402, 290 A.2d 281 (1972)	26, 27
Brown v. Clark Equip Co., 618 P.2d 267 (Hawaii 1980)	34
Bruffett v. Warner Communications, Inc., 692 F.2d 910 (3d Cir. 1982)	9
Burch v. Sears, Roebuck and Co., Pa. Superior Ct. , 467 A.2d 615 (1983)	22, 23, 24, 30, 38
Capasso v. Minster Machine Co., Inc., 532 F.2d 952 (3d Cir. 1976)	31
Carter v. Joseph Bancroft & Sons Co., 360 F. Supp. 1103 (E.D. Pa. 1973)	21, 22, 37
Clark v. Crane Carrier Co., 69 Ill.App. 3d 514, 387 N.E.2d 871 (1979)	34, 36
Dorsey v. Yoder, 331 F. Supp. 753 (E.D. Pa. 1971), aff'd mem., 474 F.2d 1339 (3d Cir. 1973)	31, 34
Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)	8
Fabian v. E. W. Bliss Co., 582 F.2d 1257 (10th Cir. 1978)	34, 36
Fischer v. Cleveland Punch and Shear Works Co., 91 Wis. 2d 85, 280 N.W.2d 280 (1979)	34, 36
Forry v. Gulf Oil Corp., 428 Pa. 334, 237 A.2d 593 (1968)	22, 37
Francioni v. Gibsonia Truck Corp., 472 Pa. 362, 372 A.2d 736 (1977)	19
Greco v. Bucciconi Engineering Company, 283 F. Supp. 978 (W.D. Pa. 1967), aff'd 407 F.2d 87 (3d Cir. 1969)	21

Greiner v. Volkswagenwerk Aktiengesellschaft, 540 F.2d 856 (3d Cir. 1976)	11
Guaranty Trust Co. v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945)	8
Hammond v. International Harvester, 691 F.2d 646 (3d Cir. 1982)	25, 37
Heckman v. Federal Press Co., 587 F.2d 612 (3d Cir. 1978)	25, 31, 32, 34
Holloway v. J. B. Systems, Ltd., 609 F.2d 1069 (3d Cir. 1979)	32
Merriweather v. E. W. Bliss Co., 636 F.2d 42 (3d Cir. 1980)	33, 34
Michalko v. Cooke Color and Chemical Corp., 91 N.J. 386, 451 A.2d 179 (1982)	27, 28, 29, 30
Miller v. Preitz, 422 Pa. 383, 221 A.2d 320 (1966)	20
Mott v. Callahan AMS Mach. Co., 174 N.J. Super. 202, 416 A.2d 57 (1980)	28
Murphy v. L & J Press Corp., 558 F.2d 407 (8th Cir. 1977)	34, 35
Neal v. Whirl Arm Flow Corp., 43 Ill.App. 3d 266, 356 N.E.2d 1173 (1976)	34, 36
Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983)	10
Powell v. E. W. Bliss, 529 F. Supp. 48 (E.D. Pa. 1981)	32
Rhoads v. Service Machine Co., 329 F. Supp. 367 (E.D. Ark. 1971)	34, 36
Rhodes v. Interstate Battery System of America, 722 F.2d 1517 (11th Cir. 1984)	37
Roy v. Star Chopper Co., Inc., 442 F. Supp. 1010 (D. R.I. 1977)	25

Salvador v. Atlantic Steel Boiler Co., 457 Pa. 24, 319 A.2d 903 (1974)	19, 20
Schell v. AMF, Inc., 567 F.2d 1259 (3d Cir. 1977)	25, 26, 31
Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965)	26, 27
Scott v. Dreis & Krump Manuf. Co., 26 Ill.App. 3d 971, 326 N.E.2d 74 (1975)	34, 35, 36
State Stove Mfg. Co. v. Hodges, 189 So.2d 113 (Miss. 1966)	27
Suvada v. White Motor Co., 210 N.E. 2d 182 (Ill. 1965)	21
Taylor v. Paul D. Abbe, Inc., 516 F.2d 145 (3d Cir. 1975)	25
Verge v. Ford Motor Co., 581 F.2d 384 (3d Cir. 1978)	1, 8, 11, 12, 13, 14, 15, 16, 17, 24, 25, 26, 27, 30, 31, 32, 34, 35, 37, 38
Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966)	30
STATUTES AND REGULATIONS:	
49 C.F.R. §393.86	2
28 U.S. §1254(1)	2
28 U.S.C. §1652	2, 8, 9
MISCELLANEOUS:	
Annotation: Alteration of Product After It Leaves Hands of Manufacturer or Seller as Affecting Liability for Product Caused Harm, 41 A.L.R. 3d 1251 (1972 & Supp. 1983)	16, 17
Annotation, Comment Note—Duty of Federal Court, Under Erie Railroad Co. v. Tompkins, to follow on Questions of State Law, Decision or Rulings of State Courts Other Than Those of Last Re- sort, 18 L.Ed. 2d 1602 (1967)	10, 11

Annotation: Products Liability: Duty of Manufacturer to Equip Product With Safety Device to Protect Against Patent or Obvious Danger, 95 A.L.R. 3d 1066	36
Annotation: Products Liability: Manufacturer's or Seller's Obligation To Supply or Recommend Available Safety Accessories in Connection With Industrial Machinery or Equipment, 99 A.L.R. 3d 693	36
Annotation: Products Liability: Manufacturer's Responsibility for Defective Component Supplied by Another and Incorporated in Product, 3 A.L.R. 3d 1016 (1965 & Supp. 1983)	17
Annotation: Products Liability: Modern Cases Determining Whether Product is Defectively Designed, 96 A.L.R. 3d 22	36
Restatement of Torts (Second) §402A	8, 11, 15, 16, 17, 18, 20, 21, 30
Uniform Certification of Questions of Law Act, 12 U.L.A. Civil Procedure and Rem Laws 52 (1967)	38



No. —————

IN THE SUPREME COURT OF THE UNITED STATES

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— Term, 198—
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MARK DAVID FIELD

Petitioner

v.

OMAHA STANDARD INC., SAVAGE TRUCK EQUIPMENT COMPANY, INTERNATIONAL HARVESTER COMPANY,

Respondents

—
**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT**
—

The petitioner Mark David Field respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 6, 1984.

—
OPINIONS BELOW
—

The opinions and orders of the Court of Appeals, and of the District Court in this case, not yet reported, appear as Exhibits A, B, and C. A copy of *Verge v. Ford Motor Company*, 581 F.2d 384 (3d Cir. 1978), is also attached as Exhibit D.

JURISDICTION

On March 6, 1984, the Third Circuit Court of Appeals entered judgment in favor of the respondents. The Third Circuit denied a rehearing of that judgment on March 30, 1984. This petition for certiorari was filed within 90 days of the judgment of the Court of Appeals. Your Court's jurisdiction is invoked under 28 U.S. §1254 (1).

STATUTORY PROVISIONS

28 U.S.C. §1652 State laws as rules of decision:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(June 25, 1948, ch. 646, 62 Stat. 944.)"

49 C.F.R. §393.86 Rear End Protection:

"Every motor vehicle, except truck-tractors, pole trailers, and vehicles engaged in driveway-tow-away operations, the date of manufacture of which is subsequent to December 31, 1952, which is so constructed that the body or the chassis assembly if without a body has a clearance at the rear end of more than 30 inches from the ground when empty, shall be provided with bumpers or devices serving similar purposes which shall be so constructed and located that: (a) The clearance between the effective bottom

of the bumpers or devices and the ground shall not exceed 30 inches with the vehicle empty; (b) the maximum distance between the closest points between bumpers, or devices, if more than one is used, shall not exceed 24 inches; (c) the maximum transverse distance from the widest part of the motor vehicle at the rear to the bumper or device shall not exceed 18 inches; (d) the bumpers or devices shall be located not more than 24 inches forward of the extreme rear of the vehicle; and (e) the bumpers or devices shall be substantially constructed and firmly attached. Motor vehicles constructed and maintained so that the body, chassis, or other partes of the vehicle afford the rear end protection contemplated shall be deemed to be in compliance with this section."

STATEMENT OF THE CASE

Plaintiff Mark David Field is almost totally blind, has incurred substantial brain damage, and unequivocally is totally and permanently disabled as a result of a 5-9 mph rear end collision when his vehicle *underrode* a truck which was manufactured and distributed by defendant International Harvester Company as a "cab and chassis" and sold by its *authorized* dealer as a "completed vehicle." There was an *unknown* body installer who was *employed by the dealer* to install the flat bed body which completed the truck prior to final sale to the buyer.

Underride is a term given to a collision in which a small car or light truck goes *under* the body of a higher trailer or truck. Typically, the minimally supported wind-shield or windshield A post impacts the truck frame, readily collapses, and like a horizontal guillotine, the truck frame causes massive head injuries and decapitations, *even at very slow speeds*. An underride device is a device attached to the rear of a truck chassis which is designed to prevent impacting vehicles from underriding the truck body. Typically the device consists of two vertical rails mounted to the rear of the chassis, with a horizontal rail attached to them approximately 30 inches or less from the ground. The purpose of the underride device is to come into contact with the hood, engine, etc., of the smaller car or truck and thus stop the following vehicle from underriding the larger vehicle. It has been *universally* known for many years that the injuries sustained in underriding vehicles are *substantially greater* than in non-underride situations. Thus the underride devices have been referred to as "*rear underride protection*." Many years ago, Jayne Mansfield was killed in such an accident which received great publicity at the time.

The record at trial revealed the following: at the time of the truck manufacture and sale, and for many years prior, trucks were assembled and sold in the following manner. A potential buyer would go to a *franchised truck dealer* (International Harvester, Ford General Motors, etc.) and tell him what he wanted (garbage truck, flatbed, dump, etc.). The International Harvester or General Motors *dealer*, using forms and information *supplied by International Harvester or General Motors*, would order a specific cab and chassis (frame and drive train) from International Harvester or General Motors that would accommodate the body desired. International Harvester or General Motors would assemble the cab and chassis from self-made and other manufacturer supplied component parts. *The International Harvester or General Motors dealer would then arrange for a body installer to supply and affix the body desired.* In attaching the desired body, the body installer would often lengthen and strengthen the frame supplied by International Harvester or General Motors, move wheels, etc. The original height and width of the frame as supplied by International Harvester or General Motors was never changed and rear underride, if appropriate, was attached to the frame as originally supplied or altered. *The International Harvester or General Motors dealer then sold the completed International Harvester or General Motors truck to the buyer.* The *cab and chassis* cost generally was the *vast bulk* of the final price.

Some bodies were built in such fashion that underride devices were not necessary (moving vans, beverage trucks, wheels back dumps, etc.) and in a few cases not feasible (pole trucks). A substantial number (estimated at 40%) had an underride danger that could be eliminated by a \$48 device. However, *truck manufacturers* such as International Harvester and General Motors *failed to supply*

such devices in their many pages of options and failed to give any instructions or warnings pertaining thereto. No one could possibly contend that it was not *feasible* to design, manufacture and provide rear underride as a *delete option* (mandatory unless inappropriate) and/or supply warnings and restrictions applicable thereto. The manufacturer contended that it was solely up to the body installers to design, manufacture, purchase, and affix underride devices.

Body installers *occasionally, but only if a vehicle was definitely going to be used in interstate commerce* (required by 1952 ICC Regulations), affixed such devices. (The dealer in the instant case testified that such devices were only affixed to 2 percent of the trucks he sold.) Even when affixed by body installers, the underride devices were generally inadequate, poorly designed sarcastically referred to as ICC step bumpers and, as plaintiff's expert testified, not much better than papier-mache. There is no doubt that the cab and chassis manufacturers knew of the wholesale violation of the intent of the 1952 regulation. The record in this area is clear that the cab and chassis manufacturers fought all regulatory attempts to give them any mandatory regulatory responsibility for rear underride devices.

Plaintiff's complaint was filed on July 8, 1981. In it plaintiff alleged that International Harvester was *strictly liable* for *failing to provide adequate underride protection AND for failing to provide body companies with complete and adequate instructions for the installation of adequate rear end protection* (Paragraph 27). Suit was also brought against Omaha Standard and Savage Truck Equipment Company as potentially the manufacturer and installer of the body involved. *Discovery revealed that Omaha did not manufacture and Savage disputed installing the subject body. Despite extensive discovery, plaintiff*

was unable to prove who manufactured and/or supplied the subject body. International Harvester thus was the only possible source of recovery for an *admittedly defective product.*

Plaintiff's theory for recovery at trial was quite simple. Since many trucks were and are built with their frames, beds, and/or bodies sufficiently elevated as to readily permit rear underride, such vehicles are defective unless equipped with rear underride devices. Furthermore, plaintiff showed that this underride danger had been *known for decades*, that *ineffective federal regulations* had been passed *as early as 1952* along these lines. International Harvester knew of these facts, but refused to do anything about it. As a result, hundreds of people were being annually killed and maimed because the *truck manufacturing industry, including defendant International Harvester, delegated* the problem and possible solutions to the body installers.

The 1,200 or so body installers, the majority of whom were "Mom and Pop" type organizations, did not have the technical expertise, financial wherewithal, and/or concern to do anything but pay lip service to the problem. On the other hand, the major truck manufacturers, including International Harvester, had the technical expertise, the financial wherewithal, and the *marketplace power* to design, test, manufacture and compel underride device use where necessary, together with appropriate instructions and warnings. The underride devices *practically* could be supplied by the manufacturers as a delete option kit which *had to be installed* when necessary by the body installer and/or dealer *prior to final sale* to the buyer. The manufacturers *had the "clout"* to remedy the situation but without statutory compulsion and with rulings such as occurred in the instant trial have delegated and continue to delegate the problem and solution to the body installers.

REASONS FOR GRANTING THE WRIT

The Third Circuit, by its affirmance of the District Court in the instant case and by its holding in *Verge v. Ford Motor Company*, 581 F.2d 384 (3d Cir. 1978), copy of opinion attached as Exhibit "D", has failed to follow §402A of the Restatement of Torts 2d as interpreted by the appellate courts of the Commonwealth of Pennsylvania and has permitted major manufacturers to relieve themselves of the responsibility for defective vehicles by letting them delegate their responsibility to smaller and financially irresponsible, and sometimes immune, entities down the manufacturing chain. These cases are not limited to trucks or the truck manufacturing process. These cases have far-reaching product liability implications which could drastically change product liability law in all areas.

A. 28 U.S.C. §1652, as Interpreted by Your Court in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and Guaranty Trust Co. v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), and Their Progeny Compel District Courts Sitting in Diversity Cases To Follow the Substantive Law of the States Where They Sit

28 U.S.C. §1652 provides:

"§1652 State laws as rules of decision

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be re-

garded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

“(June 25, 1948, ch. 646, 62 Stat. 944.)”

28 U.S.C. §1652 has been interpreted time and time again as *requiring* district courts sitting in diversity cases to follow the substantive law of the states where they sit.

“Under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), we, and the district court, are bound in diversity cases by the law of Pennsylvania as it has been determined by the state supreme court.” *Baker v. Outboard Marine Corp.*, 595 F.2d 176, 182 (3d Cir. 1979); also see *Bruffett v. Warner Communications, Inc.*, 692 F.2d 910, 918 (3d Cir. 1982).

When there are no cases directly on point the following principle applies:

“Inasmuch as no New Jersey cases are squarely on point, it is important to make clear that our disposition of this case must be governed by a prediction of what a New Jersey court would do if confronted with the facts below us. Such an estimate cannot be the product of a mere recitation of previously decided cases. Rather, as in any diversity case, a federal court must be sensitive to the doctrinal trends of the state whose law it applies, and the policies which inform the prior adjudications by the state courts. A diversity litigant should not be drawn to the federal forum by the prospect of a more favorable outcome than he could expect in the state courts. But neither should he be penalized for his choice of the federal court by being deprived of the flexibility that a state court could reasonably be expected to show.

“The federal tribunal is thus obligated to follow the course that it expects New Jersey courts would

adopt in similar circumstances." (Emphasis added.) (Footnotes omitted.) *Becker v. Interstate Properties*, 569 F.2d 1203, 1205, 1206 (1977).

Also see, *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896, 897 (3d Cir.) (1983):

"While cognizant of these developments, we are also mindful of the limitations placed upon a federal court sitting in diversity. As this court has ruled, we are 'not free to follow our own inclination as to the manner in which the common law should develop...' *Bruffett v. Warner Communications, Inc.*, 692 F.2d 910, 918 (3d Cir. 1982). Thus, we are confined to the developments of the Pennsylvania common law that govern this case. At the same time, however, 'a federal court must be sensitive to the doctrinal trends of the state whose law it applies, and the policies which inform the prior adjudication by the state courts.' *Becker v. Interstate Properties*, 569 F.2d 1203, 1206 (3d Cir. 1977). Difficulties arise where

"'the highest state court has not yet authoritatively addressed the critical issue. Recent opinions of this Court make clear that our disposition of such cases must be governed by a prediction of how the state's highest court would decide were it confronted with the problem. Although some have characterized this assignment as speculative or crystal-ball gazing, nonetheless it is a task which we may not decline.'

"*McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 661-62 (3d Cir. 1980) (footnote omitted)."

As to the precedential value of courts "other than" the highest court in the state see Annotation, Comment Note—Duty of Federal Court, Under *Erie Railroad Co. v. Tompkins*, to follow, on Questions of State Law, Decision

or Rulings of State Courts Other Than Those of Last Resort, 18 L.Ed. 2d 1602 (1967) with latest supplement.

It is clear that the Third Circuit in *Verge* and in the instant case disregarded their statutory mandate, fashioned a new principle of law that does not comport with §402A of the Restatement of Torts 2d, as interpreted by the courts of Pennsylvania and, injustice, disparity of treatment, and unfairness has followed. Although this case was filed by plaintiff in the federal system, many similar cases in the state system have been transferred at the request of defendants to take advantage of *Verge* until the State Supreme Court overrules it. A similar major conflict in the products liability area between our state and federal courts occurred in the "unreasonably dangerous" charge area which took several years to correct (e.g. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 103, 337 A.2d 893 (1975), *Azzarello v. Black Bros. Co., Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978), *Greiner v. Volkswagenwerk Aktiengesellschaft*, 540 F.2d 85 (3d Cir. 1976)). An appeal should be granted to correct this pernicious and pervasive problem immediately.

B. The Holding of *Verge v. Ford Motor Company* Which Compares the Conduct of the Parties Within the Chain of Manufacturing and Distribution of a Product and Limits Liability for a Defective Product to Only One Party Within the Chain Is Not Consistent With the Basic Principles of §402A as Interpreted by the Courts of Pennsylvania

- 1) *Verge announced a balancing test involving various suppliers that has no basis in the Restatement or the cases cited in Verge.*

In 1978 the Third Circuit Court decided *Verge v. Ford Motor Company*, 581 F.2d 384 (3d Cir. 1978), a

case which *has had far-reaching applications*. *Verge* involved an injured sanitation department employee who brought suit against the *manufacturer of the cab and chassis* (Ford), *the distributor* and the *designer and assembler of the garbage dump body*. Plaintiff's contention was that the garbage truck (end product) was *defective* because it lacked *adequate mirrors and a warning device* that would automatically activate when the subject vehicle was put in reverse:

Judge Higginbothem posed the legal question involved as follows:

"We must address, in this case, a little-litigated subtlety of products liability law: On whom to place design responsibilities where a product has been manufactured and assembled in more than one stage. Because we conclude that the Ford Motor Company was not responsible for the design defect here, we hold that the district court erred in denying Ford's Motion for Judgment n.o.v." *Verge, supra*, at 385. (Emphasis added.)

Judge Higginbotham's legal conclusion was reached by the following analysis:

"Any design defect case of this type involves two primary issues: (1) Was there a defect?; (2) If so, who is responsible for it? . . . We confront, here, the second issue. More precisely, we must determine whether the responsibility for installing such a device should be placed solely upon the company that manufactured the cab and chassis, or solely upon the company who modified the chassis by adding the compactor unit or upon both." *Verge, supra*, at 386. [Insight to the Court's reasoning can be gleaned from Footnote 2 which rephrases the issue in terms of Restatement §402A's requirement that the sup-

plied product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." By rephrasing the question it no longer appears to be "a little-litigated subtlety of products liability law."]

"This court has previously stated: '[W]e believe that the requirement that *liability only be imposed where the manufacturer is responsible for the defective conditions is necessarily implicit in §402A.* . . .' Taylor v. Paul O. Abbe, Inc., 516 F.2d 145, 147 (3d Cir. 1975). Where, as here, the finished product is the result of *substantial work by more than one party*, we must determine responsibility for the absence of a safety device by looking primarily to *at least three factors*: [There is no clue as to how Judge Higginbotham reached the three factor approach.]

"1. Trade Custom—at *what stage* is that device generally installed . . . Yates v. Hodges, 386 U.S. 912, 87 S.Ct. 860, 17 L.Ed.2d 784 (1967); Schipper v. Levitt and Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

"2. *Relative expertise—which party is best acquainted with the design problems and safety techniques in question.* . . .

"3. Practicality—at *what stage is installation of device most feasible*. See Taylor, *supra*; Bexiga v. Havig Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972); State Stove Mfg. Co., *supra*." Verge, *supra*, at 386, 387. (Emphasis added.)

After finding trade custom nonpersuasive, the Court concluded that the garbage truck designer and assembler "*was more expert* than Ford in the design of refuse collection vehicles" and "*it is considerably more practical* for

warning devices to be installed by Leach [garbage truck designer and assembler] rather than by Ford." *Verge, supra*, at 388. (Emphasis added.)

"Since Ford manufactures the F-700 for a variety of uses and Leach's conversion business is solely concerned with garbage trucks, it *seems much more practical* for *Leach to install the warning device*. Cf. State Stove, *supra* (more practical for plumber to install safety appliance on water heater than for manufacturer held not liable); Schipper v. Levitt, *supra* (similar facts and result)." *Verge, supra*, at 389. (Emphasis added.)

One could limit *Verge* to its facts. Where the direct evidence shows a manufacturer makes a product that has multiple uses, the product as made is as safe as it can be, the manufacturer has *no idea* and *cannot reasonably foresee* an addition or change that will create a specific danger in the final product, where the *danger or defect* is *solely created* by the *later* manufacturer, where even if the later danger could be reasonably foreseen it was *not feasible* to add the safety devices at the time of *original* manufacture, *then* the original manufacturer would not be liable.

That factual scenario almost never exists except in the case of manufacturers of raw material like pig iron or component parts manufacturers whose parts are not inherently defective but become single elements in a later defectively designed end product. Obviously U. S. Steel, which supplies steel, and Bendix, which supplies brakes, should not be liable for a General Motors car which might not be crashworthy. In most cases and probably even in *Verge*, Ford knew or *could have easily learned* from its dealer that certain specific cabs and chassis sold will have backup problems when outfitted with certain bodies and

thus Ford should have supplied optional mirrors and warning devices to be affixed to such vehicles *prior to leaving the dealer's hands.*

The broad language of Verge, however, states that **WHENEVER** products are manufactured **IN STAGES** [practically almost all products] liability is limited **SOLELY** to the manufacturer **WHO BY TRADE CUSTOM, RELATIVE EXPERTISE AND PRACTICALITY** is **BEST** able to install a safety device. In multi-step manufacturing processes which constitute the bulk of manufactured products, Verge invites a comparison of **ALL** of the suppliers in the distribution chain. It further requires concluding **AS A MATTER OF LAW** (Verge) or submitting as a question of fact supplier **PREDOMINANT** capability in reaching **ONLY ONE** defendant. [Verge initially contemplated one or the other or **BOTH** but then ignores the **BOTH** possibility.]

Verge invites the comparison of the **CONDUCT** and **ABILITIES** of the various suppliers **RATHER THAN THE DEFECTIVENESS** of the product at a particular time. Verge saddles plaintiffs with an **ADDITIONAL** procedural and substantive burden of proof in product liability law never before mentioned.

The **MOST** responsible supplier may well be the **MOST JUDGMENT PROOF** or, as in the instant case, unknown, and then the goals of §402A will have been frustrated.

(2) *Verge is not in keeping with the language, comments and philosophy of Restatement of Torts (Second) §402A.*

Restatement of Torts (Second) §402A provides that a seller is liable if:

"(a) the *seller* is engaged in the business of selling such a product, and

(b) *it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.*" (Emphasis added.)

Comment "c", states:

"c. On whatever theory, the justification for the strict liability has been said to be that the *seller*, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that *reputable sellers* will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon *those* who *market* them, and be treated as a cost of production against which liability insurance can be obtained; and that the *consumer* of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products." (Emphasis added.)

The Restatement saddles a **SELLER** with liability **EVEN IF HE** had nothing to do with the defect in the product and could not even discover it. The Restatement does not "implicitly" impose liability **ONLY** "where the manufacturer is responsible for the defective condition." Verge, *supra*, at 386, 387. Furthermore, a consumer obviously would not have "**THE MAXIMUM OF PROTECTION** at the **HANDS OF SOMEONE**" if the Verge analysis could well result in **RESPONSIBILITY BEING**

PLACED SOLELY ON A JUDGMENT PROOF OR UNKNOWN SUPPLIER.

Comments "p" and "q" are the only ones which can be arguably held to apply by the defense to the instant case. Comment "p" deals with products that are expected to undergo substantial change (*Verge footnote 2*) and comment "q" deals with component parts.

The Court should note that from the outset (1965) the intent of the Restatement was for responsibility to lie unless the product was *capable of* and *was drastically changed* and the *drastic change was not anticipated*.

"p. *Further processing or substantial change.*

...

"It seems reasonably clear that the mere fact that the product is to *undergo processing*, or *other substantial change*, will not in all cases relieve the seller of liability under the rule stated in this Section. If, for example, raw coffee beans are sold to a buyer who roasts and packs them for sale to the ultimate consumer, it cannot be supposed that the seller will be relieved of all liability when the raw beans are contaminated with arsenic, or some other poison. Likewise the seller of an automobile with a defective steering gear which breaks and injures the driver, can scarcely expect to be relieved of the responsibility by reason of the fact that the car is sold to a dealer who is expected to 'service' it, adjust the brakes, mount and inflate the tires, and the like, before it is ready for use. *On the other hand, the manufacturer of pig iron, which is capable of a wide variety of uses, is not so likely to be held to strict liability when it turns out to be unsuitable for the child's tricycle into which it is finally made by a remote buyer.* The question is essentially one of whether the responsi-

bility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes."

See Annotation: *Alteration of Product After It Leaves Hands of Manufacturer or Seller As Affecting Liability For Product Caused Harm*, 41 A.L.R. 3d 1251 (1972 & Supp. 1983).

"q. *Component parts.* The same problem arises in cases of the sale of a component part of a product to be assembled by another, as for example a tire to be placed on a new automobile, a brake cylinder for the same purpose, or an instrument for the panel of an airplane. Again the question arises, whether the responsibility is not shifted to the assembler. It is no doubt to be expected that where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer. . . ." Restatement of Torts 2d §402A, comments p and q.

See Annotation: *Products Liability: Manufacturer's Responsibility for Defective Component Supplied by Another and Incorporated in Product*, 3 A.L.R.3d 1016 (1965 & Supp. 1983)

The Pennsylvania Supreme Court, the highest court in Pennsylvania, has held that the underpinning of Section 402A is a public policy decision to make ALL persons in the distribution chain of consumer products liable without fault for ANY defective condition of a product which causes injury.

"The development of a sophisticated and complex industrial society with its proliferation of new products and vast changes in the private enterprise system has inspired a change in legal philosophy from

the principle of *caveat emptor* which prevailed in the early nineteenth century market place to the view that a *supplier* of products should be deemed to be 'the guarantor of his products' safety.' *Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 32, 319 A.2d 903, 907 (1974). The realities of our economic society as it exists today forces the conclusion that the risk of loss for injury resulting from defective products *should be borne by the suppliers*, principally because they are in a position to absorb the loss by distributing it as a cost of doing business. In an era of giant corporate structures, utilizing the national media to sell their wares, the original concern for an emerging manufacturing industry has given way to the view that it is now the consumer who must be protected. Courts have increasingly adopted the position that the risk of loss must be placed upon the *supplier* of the defective product without regard to fault or privity of contract." (Footnote omitted.) (Emphasis added.) *Azzarello v. Black Bros. Co., Inc.*, 480 Pa. 547, 391 A.2d 1020, 1023-24 (1978).

The Pennsylvania Supreme Court was quite specific in *Salvador v. Atlantic Steel Boiler Co.*, *supra*, as to the ultimately responsible *supplier*.

"Today . . . a *manufacturer* . . . is effectively the *guarantor of his products' safety*. . . . Our courts have determined that a *manufacturer by marketing and advertising his product* impliedly represents that it is safe for its intended use. We have decided that no current societal interest is served by permitting the manufacturer to place a defective article in the stream of commerce and then to avoid responsibility for damages caused by the defect." [International Harvester, Ford, and General Motors market, adver-

tise and sell trucks; not the 1,500+ body installers or thousands of component part suppliers.] *Salvador, supra*, 457 Pa. at 32, 319 A.2d at 907.

Similarly, in *Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966) (cited favorably in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966)), the court stated:

“The public, with justification, expects that, in the case of products *of which it has a need and for which it must rely* upon those who *make and market* the product, such manufacturers and sellers, *be they proximate or remote*, will *stand behind their products*; the burden of injuries caused by defects in such products should fall upon *those who make and market* the products and the consuming public is entitled to the maximum of protection.” *Miller, Id.* at 411, 412. (Emphasis added.)

The buyer of trucks has no idea and could care less who supplied the hundreds of component parts. *He buys a Ford, General Motors or International Harvester truck and goes to the Ford, General Motors or International Harvester dealers to purchase such vehicles.* Thus, consistent with the fundamental principles and the intended purpose of §402A:

“[P]ublic policy demands that *responsibility be fixed wherever it will most effectively* reduce the hazards to life and health inherent in defective products that reach the market.” (Emphasis added.). [Ford, General Motors and International Harvester can most effectively reduce the hazards of life.] *Francioni v. Gibsonia Truck Corp.*, 472 Pa. 362, 365, 372 A.2d 736, 738 (1977).

[Please consider the intent of the Pennsylvania courts to make available *all possible* entities, and par-

ticularly the major manufacturers, so that an injured person would not go uncompensated.]

As stated in *Abdul-Warith v. Arthur G. McKee and Co.*, 488 F. Supp. 306, 310 (E.D. Pa. 1980), *aff'd*, 642 F.2d 440 (3d Cir. 1981):

"The Pennsylvania courts have imposed strict liability for a defective product on *all* sellers in the distributive chain, *Bialek v. Pittsburgh Brewing Co.*, 430 Pa. 176, 187-88, 242 A.2d 231, 236 (1968), and have brought manufacturers of component parts, *Burbage v. Boiler Engineering & Supply Co.*, 433 Pa. 319, 324-25, 249 A.2d 563, 566 (1969), used products dealers, *Mixer v. Mack Trucks, Inc.*, 224 Pa. Super. 313, 315, 318, 308 A.2d 139, 140, 142 (1973) and lessors, *Francioni v. Gibsonia Truck Corp.*, 472 Pa. 362, 368-69, 372 A.2d 736, 739-40 (1977), within the sweep of section 402A.

"As these decisions illustrate, the *attitude of the Pennsylvania courts* has been *more expansive* than restrictive. The underlying policy has been to hold strictly liable for ensuing harm *all suppliers* of products who, because they are engaged in the business of selling or supplying a product, have assumed a special responsibility toward the consuming public. *Francioni v. Gibsonia Truck Corp.*, *supra*, 472 Pa. at 366, 372 A.2d at 738." *Abdul-Warith, supra*, at 310. (Emphasis added.) Also see *Greco v. Bucciconi Engineering Company*, 283 F. Supp. 978 (W.D. Pa. 1967) (engineering firm, general contractor and employer *aff'd*, 407 F.2d 87 (3d Cir. 1969); *Suvada v. White Motor Co.*, 210 N.E.2d 182 (Ill. 1965) (superficially discussing comment "q" of Restatement); *Carter v. Joseph Bancroft & Sons Co.*, 360 F.

Supp. 1103 (E.D. Pa. 1973) (licensor); *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593 (1968) (name on product).

The Superior Court of Pennsylvania recently held in *Burch v. Sears, Roebuck and Co.*, Pa. Superior Ct. , 467 A.2d 615, 621, 622, 623 (1983):

"Under our products liability law, *all suppliers* of a defective product in the chain of distribution, whether retailers, partmakers, assemblers, owners, sellers, lessors, or any other relevant category, are potentially liable to the ultimate user injured by the defect. *Francioni v. Gibsonia Truck Corp.*, 472 Pa. 362, 372 A.2d 736 (1977); *Grubb v. Albert Einstein Medical Center*, 255 Pa. Superior Ct. 381, 387 A.2d 480 (1978); *Kitzinger v. Gimbel Bros., Inc.*, 240 Pa. Superior Ct. 345, 368 A.2d 333 (1976). This rule of law ensures the availability of compensation to the injured party, and helps place the burden of such injury on parties who, unlike the consumer, have a better opportunity to control the defect or spread its costs through pricing. See *Berkebile v. Brantly Helicopter Corp.*, *supra*; *Webb v. Zern*, *supra*. To further achieve these policies and to do justice among the potential defendants, Pennsylvania permits the remedies of indemnity and contribution so that as among those in the chain of distribution liability may ultimately rest with, or be shared equally among, those who can best detect, control, or prevent the defect.

* * *

"[22] Indemnity, as the more drastic remedy, is 'recognized in cases where community opinion would consider that in justice the responsibility should rest upon one [defendant] rather than the

other.' W. Prosser, *Law of Torts* 313 (4th ed. 1971) (quoted with approval *Mixer v. Mack Trucks, Inc.*, *supra*). Thus, indemnity is only available from those who are primarily liable to those who are merely secondarily or vicariously liable. *Builders Supply Co. v. McCabe*, *supra*. To evaluate primary as against secondary liability courts have focused on factors such as active or passive negligence and knowledge of or opportunity to discover or prevent the harm. *Id.* In chain of distribution cases, where there are many levels of contact with the product, and thus several possible degrees of liability, our courts have cited with approval Restatement of Restitution §95 (1936):

'Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability.'

See *Mixer v. Mack Trucks, Inc.*, *supra*. The Restatement of Restitution also addresses indemnity in a chain of distribution case:

'Where a person has supplied to another a chattel which because of the supplier's negligence or other fault is dangerously defective for the use for which it is supplied and both have become liable in that to a third person injured by such use, the supplier is under a duty to indemnify the other for expenditures properly made in discharge of the claim of the third person, if the other used or disposed of the chattel in reliance upon the supplier's care and if, as between the two, such a reliance was justifiable.'

Restatement of Restitution §93(1) (1936). When adapting these standards to strict liability cases, see *Burbage v. Boiler Engineering & Supply Co.*, *supra*; *Mixter v. Mack Trucks, Inc.*, *supra*, our courts look to the facts rather than the form of liability along, *id.*, and 'view trade relations realistically rather than mythically.' *Verge v. Ford Motor Co.*, 581 F.2d 384 (3rd Cir. 1978). Thus, in determining who may be 'primarily responsible' and required to indemnify in a products liability case, our courts have evaluated the facts in light of products liability policies, particularly by focusing on opportunity to discover or actual knowledge of the defective condition and on the relative burdens of correcting or preventing the defect. *Burbage v. Boiler Supply & Engineering Co.*, *supra*; *Mixter v. Mack Trucks, Inc.*, *supra*; *Verge v. Ford Motor Co.*, *supra* (relevant facts include trade custom, relative expertise, and practicality)." (Emphasis added.) (Footnotes omitted.)

Burch clearly states that Verge is only relevant ON INDEMNNITY OR CONTRIBUTION issues as BETWEEN DEFENDANTS and not vis-a-vis the initial products liability issue that exists between plaintiff and defendant. Burch was not appealed; therefore, it is unquestionably the law in Pennsylvania.

Not a single one of the above cases invites any supplier comparisons. Furthermore, from the above, it is patently clear that the Restatement *explicitly* holds that *all* sellers who sell defective products are liable and *not just* the *most* culpable. The Restatement did not "implicitly" limit liability to those who were responsible for the defect as stated in *Verge* and Pennsylvania law does not permit such a comparison.

3) *Verge misinterprets the cases cited for support and announces a comparison procedure not present in ANY of the cases. Furthermore, some of the principles expressed are of doubtful current legal validity.*

There is not a single case cited by *Verge* that stands for the *novel three factor comparison* test announced by *Verge* to determine which seller should be responsible. *Verge* relies heavily upon *Taylor v. Paul O. Abbe, Inc.*, 516 F.2d 145 (3d Cir. 1975). That case involved a manufacturer who had had *nothing to do* with the design and construction of a mill in 1909, but who upon *specific request* in 1964 supplied certain *substitute* replacement parts.

This is a far cry from a manufacturer of a cab and chassis which has an *inherent* underride danger who *fails to offer* in its *five pages of options* an underride safety device. *Taylor* may not even be the law today. *Hammond v. International Harvester*, 691 F.2d 646 (3d Cir. 1982); *Heckman v. Federal Press Co.*, 587 F.2d 612 (3d Cir. 1978); *Roy v. Star Chopper Co., Inc.*, 442 F. Supp. 1010 (D. R.I. 1977).

Verge cites *Schell v. AMF, Inc.*, 567 F.2d 1259, 1263 (3d Cir. 1977), as its *sole* support for comparing "relative expertise." *Verge*, however, takes totally out of context the *six* factors the *Schell* court considered relevant in determining if the subject product was "*unreasonably dangerous*" (i.e., social utility; expected expertise of manufacturer; simplicity, feasibility and low cost of an interlock; the fact that interlock would be an improvement; use of interlock would not improve efficiency; injury without interlock apt to be serious), removes one ("expected expertise of the manufacturer in a highly specified field") modifies it ("relative expertise") and then cites

Schell, supra, as the sole basis for comparing "relative expertise" to determine the *most culpable* defendant.

Verge cites two New Jersey cases: *Bexiga v. Haver Manufacturing Corp.*, 60 N.J. 402, 290 A.2d 281 (1972), with respect to determining responsibility by looking at "practicality"; and *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965) as to custom.

Bexiga involved a young man who lost fingers in a press manufactured by Haver. Plaintiff's expert conceded on cross-examination that:

"... in accordance with the *custom* of the trade, presses like the one in question were not equipped with safety devices by the manufacturer. Rather, he said safety devices were to be installed by the ultimate purchaser. However, in his opinion the custom of the trade was improper in that the machine was defectively designed for safety and that purchasers 'almost never' provided safety devices. . . ." *Bexiga, supra*, at 283. (Emphasis added.)

Although both custom and New Jersey statutory law compelled *factory owners*, not manufacturers, to supply protective devices, the New Jersey Supreme Court said:

"Where a manufacturer places into the channels of trade a finished product which can be put to use and which should be provided with safety devices because without such it creates an unreasonable risk of harm, and where such safety devices can feasibly be installed by the manufacturer, the fact that he expects that someone else will install such devices should not immunize him. The public interest in assuring that safety devices are installed demands more from the manufacturer than to permit him to leave such a critical phase of his manufacturing process to the haphazard conduct of the ultimate purchaser. The

only way to be certain that such devices will be installed on all machines—which clearly the public interest requires—is to place the duty on the manufacturer where it is feasible for him to do so. [International Harvester in the instant case was relying on any one of 1,500 body installers to attach a necessary safety device.]

"[4] We hold that where there is an unreasonable risk of harm to the user of a machine which has no protective safety device, as here, the jury may infer that the machine was defective in design unless it finds that the incorporation by the manufacturer of a safety device would render the machine unusable for its intended purposes." *Bexiga* at 285. (Emphasis added.)

Bexiga holds that a manufacturer is to be held liable if it could have feasibly incorporated a safety device into its product. Rather than considering "custom" as a controlling factor, the *Bexiga* court requires that it be ignored in favor of "feasibility." Instead of a three part test (custom, relative expertise and practicality), *Bexiga* advocates only one—"feasibility." *Bexiga* clearly does not support *Verge* as implied by the *Verge* court but rather refutes it.

Schipper, supra, and the 1966 Mississippi case of *State Stove Mfg. Co. v. Hodges*, 189 So.2d 113 (Miss. 1966) (5/4 decision) involved the nonliability of a heater manufacturer for a heater that exploded because of faulty installation. (Query present validity under current cases dealing with component parts.)

Subsequent New Jersey cases have considered *Verge* and have decided not to follow it. *Michalko v. Cooke Color and Chemical Corp.*, 91 N.J. 386, 451 A.2d 179

(1982); *Mott v. Callahan AMS Mach. Co.*, 174 N.J. Super. 202, 416 A.2d 57 (1980).

Michalko, supra, involved a fact situation where an independent contractor rebuilt presses without safety devices to the *exact specifications* of *at least an equally knowledgeable* manufacturer who originally manufactured the presses and who would be expected to supply same.

"In this case, defendant does not contest the fact that the rebuilt press was a defectively designed product. Rather, it claims that since it was hired to rebuild part of the press to the owner's specifications, it never exerted enough control over the product to be legally responsible for injuries resulting from design defects. See *Scanlon v. General Motors Corp.*, 65 N.J. at 591, 326 A.2d 673. Cf. *Menacho v. Adamson United Co.*, 420 F. Supp. 128, 139 (D. N.J. 1976) (as between an original manufacturer and a subsequent rebuilder of a product, liability should be imposed for a defect commensurate with the degree of product control).

"[11] We reject this argument. Defendant's lack of responsibility under its contract for the design of the machine is not relevant. Consequently, its adherence to or reliance upon the owner's plans, even though required by its contract, is equally irrelevant. It is not necessary to show that defendant created the defect. What is important is that the defect did in fact exist when the product was distributed by and was under the control of the defendant.'...

"Defendant cites Verge for the proposition that trade custom is a determinative factor relating to responsibility for providing safety devices. In this case, both parties spent a great deal of time at trial trying

to demonstrate whether or not defendant complied with the custom of the trade. . . . It is for the Court to determine whether a legal duty will be imposed. In Freund, we held that the *existence of a duty to make a product safe or to give adequate warning 'must be said to attach without regard to prevailing industry standards.'* . . . Defendant further contends that it cannot be held liable because it did not manufacture a finished product. The transfer press was not complete after Cubby rebuilt it and Elastimold still had to add the electrical and hydraulic systems to make the press operational.

"Even a significant subsequent alteration of a manufactured product will not relieve the manufacturer of liability unless the change itself creates the defect that constitutes the proximate cause of the injury. . . . Thus, if the defect which, singly or in combination, caused the injury existed before, as well as after, the change, the manufacturer is not relieved of liability, regardless of how much the product has been changed.

"[16] Furthermore, the fact that the parties, Cubby and Elastimold, understood that Elastimold would furnish a particular safety device, which the latter then failed to do also relates to proximate cause. Elastimold's failure in this regard arguably constituted a causal act which contributed to plaintiff's ultimate injury. *However, such a combination of causes leading to this industrial accident would not relieve Cubby of liability. . . ."* Michalko, *supra*, at 183-186. (Footnote omitted.) (Emphasis added.)

The Supreme Court of New Jersey in *Michalko* also held that an independent contractor who undertakes to rebuild parts of a machine to the specifications of an equally

knowledgeable manufacturer has the duty to warn without regard to custom and prevailing industry standards. *Michalko, supra*, at 187.

As stated before, the Superior Court of Pennsylvania has recently limited *Verge* in *Burch v. Sears, Roebuck and Co.*, *supra*, to the issue of indemnity or contribution, not principal strict liability issues.

It is clear from the above analysis the Verge had NO PRECEDENT for its three factor method of determining responsibility. On the contrary, the cases analyzed stand for the opposite conclusion.

4) *Verge does not comport with product liability principles expressed in Pennsylvania appellate cases and those expressed in most jurisdictions which have adopted Restatement of Torts (Second) §402A.*

As discussed previously, there is no appellate case in Pennsylvania, state or federal, other than *Verge* which invites a comparing of suppliers to find the one most responsible and certainly none which invites the three factor test expressed. In fact there is none in the country except a Texas case which followed *Verge*.

There are some federal trial court decisions which have followed *Verge* literally and applied the three factor test. Defendant has discussed same in detail in his briefs and thus bootstrapped his *Verge* argument. Suffice it to say, if *Verge* is wrong, those cases are wrong. If *Verge* is right, products liability law will never be the same.
NO COURT COULD PRESUME THAT THE PRESENT MAKEUP OF THE PENNSYLVANIA SUPREME COURT WOULD APPLY A VERGE TYPE ANALYSIS TO THE INSTANT CASE.

Pennsylvania law is by and large on all fours with *Michalko, supra*. See *Burch v. Sears, supra*, and cases

cited therein. *Verge* is not even consistent with other Third Circuit and other Circuit opinions.

On the *question of supplier comparisons and custom*, the very same year as *Verge*, the Third Circuit decided *Heckman v. Federal Press Co.*, 587 F.2d 612 (3d Cir. 1978). *Heckman*, like *Schell*, *supra*, *Capasso v. Minster Machine Company, Inc.*, 532 F.2d 952 (3d Cir. 1976); *Dorsey v. Yoder*, 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd mem.*, 474 F.2d 1339 (3d Cir. 1973) and *Verge*, *supra*, involved the lack of a safety device. The Third Circuit held:

“Federal contended it was *not customary in the trade to furnish guards except upon request*, and the *multitude of uses to which the machine could be put made it impracticable to designate any one device as standard equipment*. Moreover, Clark’s failure to heed Federal’s warning was said to be a superseding cause absolving defendant from all liability. Finally, Federal relied upon state regulations placing responsibility for the safe operation of presses upon employers and employees.” *Heckman, supra*, at 615.

Acknowledging a similarity to *Capasso, supra*, the Third Circuit held:

“If a manufacturer fails to provide reasonable safety devices for a product and thus creates an *unreasonable risk of harm* to the user, the fact that the manufacturer may *expect the user* to provide a protective appliance is not sufficient to preclude liability in most circumstances. See *Bexiga v. Havar Manufacturing Co.*, 60 N.J. 402, 411, 290 A.2d 281, 285 (1972). See also *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 761-62 (E.D. Pa. 1971), *aff'd mem.*, 474 F.2d 1339 (3d Cir. 1973). *The issue* is one which should

be decided by a jury in light of such matters as the *feasibility of incorporating safety features during manufacture of the machine, the likelihood that users will not secure adequate devices, whether the machinery is of a standard make or built to the customer's specifications, the relative expertise of manufacturer and customer, the extent of risk to the user, and the seriousness of injury which may be anticipated.*" *Heckman, supra*, at 617.

In *Heckman* the Third Circuit thus distinguished *Verge* on almost identical facts to *Powell v. E. W. Bliss*, 529 F. Supp. 48 (E.D. Pa. 1981), where *Verge* was followed.

Also, relative expertise appears not in the context of determining *who* is best able to add a safety device, but rather in the context of "*unreasonable risk of harm.*" The Third Circuit did not include "custom" as a means of selecting supplier responsibility. (It would be interesting to speculate even as to a six factor test in light of *Azzarello v. Black Bros. Co., Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978).)

Again, on the *irrelevancy of custom*, the Third Circuit held in *Holloway v. J. B. Systems, Ltd.*, 609 F.2d 1069 (3d Cir. 1979):

"It was inappropriate to admit testimony regarding trade custom, because the jury might have inferred that if virtually no other tank manufacturer in 1969 included a warning about pressurization it could hold EGW not liable. This use of trade custom as evidence of the reasonableness of EGW's inaction would be permissible if the case were tried under negligence principles, but is inconsistent with the doctrine of strict liability." *Id.* at 1073.

On the doctrine of *substantial change*, the Court's attention is directed to *Merriweather v. E. W. Bliss Co.*, 636 F.2d 42 (3d Cir. 1980):

"At the outset we note that insofar as the trial court's charge suppressed the issue of whether the change was expected, it seems inconsistent with the language of §402A itself. That section of the Restatement indicates that the seller of a product will be liable for injuries caused by that product if "it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.' See §402A(1)(b) Restatement (Second) of Torts. Therefore, by its very terms, §402A seems to indicate that *only unexpected substantial* changes will absolve the seller of a product from liability for injuries caused by that product. See also Comment P, §402A Restatement (Second) of Torts (1965)."

Id. at 45.

"But more fundamentally, we find that the trial court's instruction was in error because it *directly contradicted the policies* underlying the Pennsylvania Supreme Court's decision in Azzarello. In Azzarello the court *eschewed the use of the phrase unreasonably dangerous* in large part because it felt that that phrase *improperly de-emphasized* the duty of the manufacturer to act as the *guarantor* of his product's safety. See Azzarello, *supra*, 480 Pa. at 559, 391 A.2d at 1027. Were we to adopt the approach to the substantial change doctrine accepted by the district court in this case we would significantly undercut this policy. If the manufacturer is to effectively act as the *guarantor* of his product's safety, then he *should be held responsible for all dangers which result from foreseeable modifications of that product.*

Yet under the view taken by the court below this would not occur. Rather, once the modification of the product was shown to be substantial the manufacturer would be excused from all liability for injuries caused by that product, *even if that modification was clearly foreseeable*. As a practical matter, therefore, the district court's decision broadens considerably the scope of the substantial change defense. Because the broadening of this defense is inconsistent with the concept of the manufacturer as the guarantor of his product, we feel that the charge given by the district court is in direct conflict with Azzarello."

Merriweather, supra, at 46. (Emphasis added.)

In addition to *Dorsey* and *Heckman*, Pennsylvania appellate courts and courts of other jurisdictions have held time and time again that no matter what the customs and standards of the trade are, a *manufacturer cannot delegate his duty to design* and manufacture a responsibly safe product to dealers, purchasers, employers or users. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 103, 337 A.2d 893 (1975). Also see *Murphy v. L & J Press Corp.*, 558 F.2d 407 (8th Cir. 1977); *Brown v. Clark Equip. Co.*, 618 P.2d 267 (Hawaii 1980); *Scott v. Dreis & Krump Manuf. Co.*, 26 Ill.App. 3d 971, 326 N.E.2d 74 (1975); *Fischer v. Cleveland Punch and Shear Works Co.*, 91 Wis. 2d 85, 280 N.W.2d 280 (1979); *Neal v. Whirl Arm Flow Corp.*, 43 Ill.App. 3d 266, 356 N.E.2d 1173 (1976); *Rhoads v. Service Machine Co.*, 329 F. Supp. 367 (E.D. Ark. 1971); *Clark v. Crane Carrier Co.*, 69 Ill.App. 3d 514, 387 N.E.2d 871 (1979); *Fabian v. E. W. Bliss Co.*, 582 F.2d 1257 (10th Cir. 1978). All of these cases hold that if a manufacturer can FEASIBLY supply a safety device or warning, he must. There is no balancing of Verge type factors as to the most culpable manufacturer.

Murphy reversed the trial court for permitting testimony and argument as to "who has the duty to guard." "This injected a false issue of fact into the proceedings, i.e., who should guard as opposed to *could L & J guard.*" *Murphy, supra*, at 412.

Brown involved the failure to supply, or at least give as an option, adequate backup mirrors. Unlike *Verge*, the manufacturer was found to be responsible.

Scott held:

"[7, 8] Guided by the language of our Supreme Court in *Rios*, we hold that a manufacturer is under a nondelegable duty to produce a product which is reasonably safe and that such duty is not obviated when a multifunctional machine is placed into the stream of commerce....

"In conjunction with the above argument, defendant alternatively argues that, if it was not entitled to a directed verdict, it should have been permitted to fully present to the jury that it was the sole responsibility of the press owner, not the manufacturer, to install safety devices. Defendant's first complaint concerns a section of the 1971 Department of Labor's Occupational Safety and Health Standards which provides that 'it shall be the *responsibility of the employer* to provide and insure the usage of either a point of operation guard or a properly applied and adjusted point of operation device on every operation performed on the mechanical power presses.' Similarly, Mr. Hazard was not allowed to testify that it was the responsibility of the press owner to equip the machine with safety devices. (Footnote omitted.)

"[10, 11] We believe that the trial court correctly refused the evidence. As earlier stated, a

manufacturer is under a *nondelegable* duty to produce a product which is reasonably safe, and a machine may be unreasonably dangerous for failure to incorporate safety devices. It therefore follows that a manufacturer cannot introduce evidence to show that the duty to incorporate the appropriate safety devices falls upon the purchaser of the product. To allow such evidence in circumstances where the appropriate safety devices have not been provided to the purchaser, would inject into the case an improper conclusion of law so far as the issues of strict liability are concerned. The evidence here was not relevant to the issue of whether the press was unreasonably dangerous and improperly sought to delegate the duty of the manufacturer to the conduct of a third party. (Footnote omitted.)" *Scott, supra*, at 84, 85. (Cites and footnotes omitted.)

Fischer, supra, apportioned fault among three defendants rather than seeking the one *most* responsible. *Neal, supra*, discounted the employer's own safety regulations. *Rhoads, supra*, stands for the proposition that warnings and reliance on who is required by law to supply guards is not enough if the supplying of a *safety device is feasible*. *Clark, supra*, and *Fabian, supra*, follow the same theme. On the general subject of providing safety accessories see *Annotation: Products Liability: Manufacturer's or Seller's Obligation to Supply or Recommend Available Safety Accessories in Connection With Industrial Machinery or Equipment*, 99 A.L.R. 3d 693; *Annotation: Products Liability: Duty of Manufacturer to Equip Product with Safety Device to Protect Against Patent or Obvious Danger*, 95 A.L.R. 3d 1066; *Annotation: Products Liability: Modern Cases Determining Whether Product is Defectively Designed*, 96 A.L.R. 3d 22.

The recent Third Circuit case of *Hammond v. International Harvester*, 691 F.2d 646 (1982), held International Harvester responsible for the errors of its authorized dealer. Also see very recent case of *Rhodes v. Interstate Battery System of America*, 722 F.2d 1517 (11th Cir. 1984), as to non-delegability.

There are many Pennsylvania cases holding a manufacturer liable just for placing name on product, e.g. *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593 (1968), and *Carter v. Joseph Bancroft & Sons Co.*, 360 F. Supp. 1103 (E.D. Pa. 1973).

CONCLUSION

The vice of *Verge* and its progeny consists in the insidious manner in which its holdings and guidelines emasculate twenty years of products liability law. Instead of looking at a press or a radial saw without a guard as the initial responsibility of *all* suppliers of same, *Verge* and its progeny would have us ask *who should put the guard on* and *saddle only the most culpable entity* with legal responsibility. If that entity be one's employer (*Powell*) or unknown (instant case), or judgment proof, too bad for the consumer and so good for the insurance industry. *Verge* also by its emphasis upon custom, relative expertise, and practicality brings into a strict liability case negligence concepts. It is a legal nicety to say that juries are to receive the information only for a limited purpose. Finally, *Verge* and its progeny permit the delegation of duty from big manufacturer to little impecunious assemblers and dealers by developing custom along these lines.

To permit the Third Circuit opinion to stand in the instant case and in *Verge* will result in different law and

different justice in Pennsylvania depending upon whether one starts suit in the federal or state court. This cannot be permitted. *Verge* has already been inferentially reversed by the Superior Court in *Burch v. Sears, Roebuck and Co.*, Pa. Super. , 467 A.2d 615 (1983), now the law in Pennsylvania. The instant plaintiff and others similarly situated should not be denied financial redress because the Supreme Court has not as yet specifically reversed *Verge*, e.g. submitting important questions. Uniform Certification of Questions of Law Act, 12 U.L.A. Civil Procedure and Rem Laws 52 (1967).

Respectfully submitted,

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APPENDIX

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA**

**Civil Action
No. 81-2712**

MARK DAVID FIELD

v.

**OMAHA STANDARD, INC.
SAVAGE TRUCK EQUIPMENT COMPANY
and INTERNATIONAL HARVESTER COMPANY**

MEMORANDUM AND ORDER

BECHTLE, J., June 23, 1983

This is a products liability action which was instituted to recover damages for personal injuries sustained by plaintiff, Mark Field. Plaintiff's injuries arose from a collision on July 10, 1979, between the truck he was driving and an aerial crane truck which consisted, in part, of a cab-chassis manufactured and sold by defendant International Harvester Company ("IH"). Following a ten day jury trial, judgment was entered for defendant in accordance with the jury's finding that the IH cab-chassis was not de-

fective at the time it left defendant's premises. Plaintiff now moves for judgment n.o.v. or in the alternative for a new trial. For the reasons which follow, plaintiff's motion will be denied.

I. FACTS

The accident in question occurred on July 10, 1979, on Route 422 near Butler, Pennsylvania, while plaintiff was working for his employer, Tam Agri Corporation. Plaintiff was driving a 1979 Ford pickup truck towing a utility trailer, and was following a fellow employee driving a flatbed aerial crane transporter. Both trucks were owned by Tam Agri. At some point the transporter stopped to make a left turn and plaintiff's pickup following immediately behind crashed into the transporter's back end. Because the hood of the pickup was lower than the body of the flatbed transporter, the pickup underrode the transporter, and the transporter's tail end crashed through plaintiff's windshield causing plaintiff serious bodily injuries.

Plaintiff brought the present products liability suit against IH claiming that the cab-chassis of the transporter was defectively designed and manufactured because it didn't have a rear underride guard to prevent an impacting vehicle from underriding the truck body in a rear end collision. The troublesome aspect of plaintiff's suit was whether the IH cab-chassis was rendered defective by its lack of an underride guard since it was the completed truck, rather than the component cab-chassis, which ultimately required the guard.

There was no dispute over the fact that the truck in question, in accordance with the standard truck manufacturing process, was manufactured in separate stages by independent parties. The first stage involved IH's delivery

of the cab-chassis unit to an intermediate purchaser, in this case a dealer. Thereafter various parties, including a body builder specializing in building flat body trucks, took part in converting the cab-chassis into the completed truck. The cab-chassis by itself was nothing more than a component of the finished product. In fact, testimony adduced at trial revealed that cab-chassis units as a class may not be driven on the public highway until they are certified as having been finished by a body builder.

The cab-chassis at issue in the present case was what IH has denominated as an F1800 Model. This unit is a multi-purpose vehicle which can be utilized for any one of hundreds of various body configurations. It was ordered from defendant IH in 1971 by Troy, Inc., an authorized IH dealer. Troy wanted this cab-chassis for an aerial crane truck to be purchased by a customer of Troy's, a building contractor named Ryland Systems. As was the usual practice, IH never knew the intended final configuration of the truck but merely filled Troy's order according to the specifications set out by Troy on IH's order forms. This could be done by IH without any knowledge of the final type of truck contemplated by the ultimate customer. Upon completion of the cab-chassis, IH delivered it to Troy which paid IH the accompanying invoice.

Troy arranged for completion of the truck to conform to its customer's needs by engaging several other parties. Thereafter the cab-chassis underwent the following changes: a crane was added; the rear wheels were moved back; the frame was lengthened as was the drive train; and a bed was added. When the work was finished the completed aerial crane truck was delivered by Troy to its customer, Ryland Systems. The truck then passed through the hands of several owners before being purchased by plaintiff's employer, Tam Agri.

The case was tried over a ten day period. Plaintiff's general theory was that IH should have provided an underride guard kit as a delete option to the order made by the original dealer for the cab-chassis. Plaintiff's expert opined that had this delete option been available, and if not deleted by the dealer, it would have been available to be attached to the crane transporter in question at some point along the assembly chain and plaintiff's injuries would have been avoided. However, another witness for plaintiff, the owner of the Troy dealership which had ordered the cab-chassis from IH and arranged for its completion by others, contradicted the expert. This witness stated that even if a guard had been offered as a delete option he would not have recommended its attachment because it would have interfered with the off-road use contemplated by the customer, in this case use relating to building construction.

The defendant offered evidence that the custom in the cab-chassis industry was for the manufacturer of the final stage to install an underride guard, if necessary. This was because the cab-chassis, being a multi-purpose vehicle, was subject to so many varied additions, deletions and other changes that until all the changes were completed, it could not be determined whether an underride guard was even needed. Also, since only the final stage manufacturer is in a position to know the final size, shape and overall configuration of the truck, it is most practical for that party to consider and, if needed, to install any necessary guard. Defendant submitted evidence which showed that final stage manufacturers had the necessary expertise to provide adequate underride safety devices in 1971 when the truck at issue was completed.

Following the conclusion of the evidence, the jury returned a verdict for defendant and found that the IH cab-

chassis was not defective when it was sold by IH to the dealer without an underride guard kit as a delete option. Plaintiff moved for judgment n.o.v. or for a new trial raising 28 separate grounds. Of these, 21 are not briefed, and are stated in merely general terms. In view of this, the Court has re-examined its previous rulings and is not persuaded that those rulings on these non-briefed points should be changed. Accordingly, it shall dismiss all non-briefed points of error for lack of prosecution in addition to lack of merit. *See Local Rule 20(c); Carl Walker & Associates, Inc. v. Dickerson Prestress, Inc.*, No. 75-2215, slip op. at 2 (E.D. Pa. Dec. 8, 1982). The remaining points are discussed below.

II. DISCUSSION

A. Agency

Plaintiff contends that the Court erred in ruling, as a matter of law, that defendant IH could not be held liable under principles of agency for the knowledge or conduct of its authorized dealer, Troy, Inc., with respect to the finished product. At the close of plaintiff's evidence pursuant to a Rule 50 motion of defendant, the Court concluded that plaintiff did not have a claim for liability under an agency theory. (Tr. 7-14). The Court's ruling was based on plaintiff's failure to prove that the scope of the agency relationship between Troy and IH would allow the knowledge and conduct of Troy relating to conversion of the cab-chassis into a completed truck to be imputed to IH. As such, removal of the agency question from the province of the jury was not error and does not afford plaintiff grounds for relief.

It is well established in Pennsylvania that the knowledge of an agent can only be imputed to the principal in connection with any transaction conducted by the agent on

behalf of the principal, when such knowledge is acquired in the course of the business in which the agent is employed. *Higgins v. Schenango Pottery Company*, 256 F.2d 504 (3d Cir. 1958). Merely to state this principal, however, is to note its most obvious limitation. The knowledge in question must have been acquired by the agent while he was acting within the scope of the agency relationship as both he and the principal understood it. Thus for the purpose of the present case, the narrow question for resolution is whether Troy, Inc. was acting as IH's agent for the specific purpose of completing the unfinished product supplied by IH and delivering it into a stream of assembly and fabrication activity by different business houses that IH had no knowledge of nor affiliation with. It should be noted that the existence of an agency relationship between the parties for purposes of sale and delivery of the cab-chassis, the component part, is not determinative of the question and may even be immaterial. Merely because a party is an agent for some purposes does not mean that the party is an agent for all purposes. *Mellon Nat. Bank & Trust Co. v. Esler*, 357 Pa. 525, 55 A.2d 327 (1947).

It is beyond dispute that for a principal to be bound by the acts of his agent, those actions must fall within the actual or apparent scope of the agency. See Restatement of Agency (Second) §216 comment a & §228 and comments a, b, c & d (1958). The scope of the agency is to be determined in light of the agreement of the principal and the agent as well as all of the accompanying circumstances. In deciding whether a particular undertaking by the agent was within the scope of the agency, one key factor is to consider if the service performed by the agent was one in which he was subject to control, or the right to control, by the principal. See *Scott v. Purcell*, 490 Pa. 109, 415 A.2d 56 (1980). If the facts concerning the connection between

the parties are not in dispute, questions concerning the existence and the nature of the relationship are properly determined by the court. *Juarbe v. City of Philadelphia*, 289 Pa. Super. 330, 431 A.2d 1073 (1981).

Here, the relationship between Troy, Inc. and IH was governed by a written agreement. Plaintiff neither introduced this agreement nor questioned his witness, Chester Troy, as to its contents. Additionally, the evidence which was adduced failed to establish any question of fact on the issue of control of the cab-chassis as it evolved at the hands of other parties into a completed product. The evidence merely demonstrated a course of conduct by the parties whereby Troy, Inc., acting as an authorized sales representative of IH cab-chassis, would solicit orders for cab-chassis, complete them without any input from IH, forward them to IH, and thereafter expect and accept delivery of the cab and chassis as ordered. There was absolutely no evidence that IH had knowledge of or any involvement in the completion of the truck once the cab-chassis was delivered to Troy, Inc. Plaintiff, at page 17 of his brief, states:

For the purpose of this argument, plaintiff also concedes that there is insufficient evidence of control by International over Troy, Inc.'s manner of selling finished trucks to establish a master-servant relationship.

Indeed, it is perfectly clear from the evidence that following delivery of the cab-chassis to the dealer, the dealer then became the agent of the customer in structuring the final stages of assembly and fabrication. The Court was thus correct concluding as a matter of law that even if an agency relationship existed between Troy, Inc. and IH, the sale of completed trucks was not within the scope of the agency that brought forth only the sale of a cab and chassis.

Plaintiff also argues that the Court erred in determining as a matter of law that IH could not be held liable under the doctrine of apparent authority or agency by estoppel. In *Turnway Corporation v. Soffer*, 461 Pa. 447, 457, 336 A.2d 871, 876 (1975), the Pennsylvania Supreme Court summarized what was then and is still current law concerning this theory of agency.

Agency by estoppel is defined by Section 8B. of the Restatement (Second) of Agency and the doctrine has been embraced by this Court in *Reifsnyder v. Dougherty*, 301 Pa. 328, 152 A. 98 (1930). Reifsnyder emphasized two basic elements of agency by estoppel: (1) there must be negligence on the part of the principal in failing to correct the belief of the third party concerning the agent; and (2) there must be justifiable reliance by the third party. . . . Agency by estoppel is generally deemed to be closely related to apparent authority. 2A C.J.S. Agency §157 (1972). Thus, alternatively stated, a principal who clothes his agent with apparent authority is estopped to deny such authority. *Robertson Coal & Coke Co. v. Rothey*, 106 Pa. Super. 463, 162 A. 332 (1932); *Fay v. Deady*, 82 Pa. Super. 187 (1923).

Applying these principles to the present case it is clear that apparent authority has no application here. Crucially absent from the facts presented is any evidence which would suggest that plaintiff relied on an IH representation of Troy, Inc. as its agent when plaintiff did anything that resulted in the collision into the rear of the flatbed trailer in question. Without any form of proof that plaintiff actually did rely on an alleged agency between Troy, Inc. and IH, counsel's position that plaintiff could have so relied is not sufficient to carry the argument.

B. *Application of Verge v. Ford Motor Company—Admissibility of Evidence and Jury Instruction*

Plaintiff cites as error the Court's application of *Verge v. Ford Motor Co.*, 581 F.2d 384 (3d Cir. 1978), to this case in allowing the admission of trade custom evidence and in instructing the jury that it should consider the *Verge* factors of practicality, expertise, and trade custom in determining the existence of a defect in the cab-chassis at the time it left defendant's possession. Plaintiff contends that *Verge* was interpreting Virgin Islands law and does not reflect Pennsylvania's view of products liability. Plaintiff's view lacks merit.

In *Verge*, a case factually similar to this one, plaintiff sued a cab-chassis manufacturer for its failure to install a backup buzzer on a vehicle later made into a garbage truck. The jury found that the absence of a warning device on the completed truck rendered it defective within the meaning of 402A and awarded plaintiff substantial damages. The cab-chassis manufacturer moved for judgment n.o.v., the denial of which was the basis of the appeal. In its discussion of the case, the Third Circuit stated that a design defect case of this type involves two primary issues: (1) was there a defect; (2) if so, who is responsible. On review, the Court found that there was substantial evidence to support the jury's finding, as to the first issue, that a defect existed. The Court then went on to consider whether "the responsibility for installing such a device should be placed solely upon the company that manufactured the cab and chassis, or solely upon the company who modified the chassis by adding the compactor unit or upon both." *Verge v. Ford Motor Co.*, *supra*, 581 at 386. The court noted that in accordance with the language of 402A the issue could be rephrased in terms of whether the truck reached the consumer without substantial change or

whether the truck was in a defective condition when it left the hands of the cab-chassis manufacturer. In making such a determination, three factors were delineated as crucial to the analysis:

1. Trade Custom—at what stage is the safety device generally installed;
2. Relative Expertise—which party is best acquainted with the design problems and safety techniques in question;
3. Practicality—at what stage is installation of the device most feasible.

Id., 581 at 387.

Contrary to plaintiff's position here, there is nothing in the *Verge* opinion itself to indicate that the issue was being resolved in the context of Virgin Islands law. Instead, available evidence points to a different conclusion. The *Verge* court cited its own prior interpretation of Pennsylvania products liability law in *Taylor v. Paul O. Abbe, Inc.*, 516 F.2d 145 (3d Cir. 1975) as the source of its holding. In *Taylor*, the Third Circuit examined Pennsylvania's interpretation of 402A liability in a situation where a manufacturer of a component part is sued for a design defect in the final product. Quoting from *Taylor* and without reference to Virgin Islands law, the *Verge* court concluded that where the final product is the result of substantial work by more than one party, the three factors set out above—custom, relative expertise, and practicality—must be weighed. Plaintiff's reliance on dicta in a footnote in *Holloway v. J. B. Systems, Ltd.*, 609 F.2d 1069, 1073 n. 11 (3d Cir. 1979) to the effect that *Verge* was a matter of Virgin Islands law, is, of course, not dispositive. Then too, the numerous decisions of this district which have applied *Verge* in interpreting liability under the Pennsylvania law of 402A, persuade this Court that application of *Verge*

to the present case was not error. *See Christner v. E. W. Bliss Co.*, 524 F. Supp. 1122 (M.D. Pa. 1981) (plaintiff's motion in limine requesting reference to trade custom be ruled inadmissible denied in view of *Verge* and court's finding that product at issue was manufactured in stages); *Lesnefsky v. Fisher & Porter Co., Inc.*, 527 F. Supp. 951 (E.D. Pa. 1981) (manufacturer of brewery control panel built to brewery's specifications granted summary judgment under *Verge*); *Powell v. E. W. Bliss*, 529 F. Supp. 48 (E.D. Pa. 1981) (punch press sold as general purpose, multifunctional unit, unequipped with dies and having no point of operation found not to be a completed product—*Verge* standards applied); *Orion Ins. Co., Ltd. v. United Technologies Corp.*, 502 F. Supp. 173 (E.D. Pa. 1980) (manufacturer of component in main rotor head assembly of a helicopter, manufactured to specifications of a third party with superior expertise in aviation, not liable for design defect—*Verge* applied). *See also Bradley v. James Campbell Smith, Inc.*, 91 F.R.D. 598 (E.D. Pa. 1981) (*Verge* may be invoked if defendants' participation in the design and manufacture of a product is found to be limited).

It was and is this Court's conclusion that *Verge* was properly applied, and consequently plaintiff's claim that the Court erred both in limiting the evidence and in instructing the jury based on the three *Verge* factors cannot stand. Plaintiff, relying on *Heckman v. Federal Press Co.*, 587 F.2d 612 (3d Cir. 1978), contended that the jury should have been able to consider six factors in determining the existence of a defect in defendant's component part. The six factors identified by the *Heckman* court included the following:

- 1) the feasibility of incorporating safety features during manufacture of the machine; 2) the likelihood

that users will not secure adequate devices; 3) whether the machinery is of a standard make or built to the customer's specifications; 4) the relative expertise of manufacturer and customer; 5) the extent of risk to the user; and 6) the seriousness of injury which may be anticipated.

Id. at 617. *Heckman*, however, is inapposite since it involved a product which was in a finished state when it left defendant's hands. Indeed the *Heckman* court itself distinguished *Verge* as a case involving an unfinished product. *Heckman, supra*, 587 F.2d at 617.

Plaintiff also argues that he was improperly denied the opportunity to introduce evidence relevant to the balance between risk of injury and product utility. On this point, plaintiff states that although the Court allowed the defendant to introduce evidence that the underride docket of the National Highway Safety Bureau, a federal agency, was terminated because the agency considered rear underride not to be cost effective (Tr. 4-121), plaintiff was precluded from offering testimony that in fact rear underride was cost effective. When all of the circumstances are considered, it is plain that the Court's rulings were proper. Defendant's evidence was permitted only because plaintiff's expert based his opinion on the existence of study and inquiry by that agency. The jury was thus allowed to hear evidence of the government activity not because it provided a standard to be followed by the manufacturer, but rather as an aide in weighing the extent to which it should rely on the opinions of plaintiff's expert (Tr. 4-121 to 4-123).

Plaintiff presents several challenges to the jury instructions, all of which may be disposed of summarily. Plaintiff contends that the Court erred in instructing the jury that if the jury determined that incorporation of a

safety device would make the product less marketable or destroy its utility, then they could not find a defect. The Court further instructed that merely because certain products are dangerous does not in itself make them defective and used a sharp knife as an illustration. In addition, the jury was instructed according to *Verge* that it should consider trade custom, practicality, and expertise as relevant, but not dispositive, in determining on whom to place liability for a defect in a finished product manufactured in stages. Finally, plaintiff contends that the Court erred in failing to give adequate cautionary instructions as to the effect of the trade custom and government regulations evidence on the issue of a defect. These claims of error in the charge must be rejected. Plaintiff did not voice these particular objections at trial and absent plain error, cannot now raise them by post-trial motion. (See Tr. 10-112 to 10-113, at which the Court called a side-bar immediately after completing the jury charge and expressly invited counsel's objections thereto). Fed. R. Civ. P. 51; *McCarthy v. Silver Bulk Shipping Ltd.*, 487 F. Supp. 1021, 1032 (E.D. Pa. 1980). The challenged instructions cannot reasonably be considered as amounting to "plain error" warranting plaintiff a new trial because the alleged errors are neither obvious nor substantial nor require judicial correction to prevent a clear miscarriage of justice. See *Wirtz v. International Harvester Co.*, 331 F.2d 462, 465 (5th Cir. 1964), cert. den., 379 U.S. 845. Finally, the Court's instructions were not only proper in view of the legal principles of *Verge* set forth earlier, they were fair and adequate when considered as a whole.

C. Admission of Evidence that Plaintiff's Brakes were Disconnected

Plaintiff posits as error the admission of certain evidence which plaintiff contends suggested that he was

negligent. Plaintiff argues that in a "second collision" case, the evidence must be limited to the nature of the product, and cannot include the conduct of the parties. While the Court doesn't fully understand the principle involved in this case as phrased by plaintiff in the "second collision" context, the Court does agree that plaintiff's conduct would not shield defendant from liability under 402A if liability would otherwise exist. *Holloway v. J. B. Systems, Ltd.*, 609 F.2d 1069 (3d Cir. 1979). In any event, the conduct evidence in question was properly admitted on the issue of proximate cause. Since the rulings may be sustained on this ground alone, the Court declines to decide whether assumption of the risk was properly at issue in the case.

As stated above, the Court has difficulty with plaintiff's conclusion that the present case should be characterized as one involving enhancement of injuries due to a second collision. As stated by the Third Circuit in *Huddell v. Levin*, 537 F.2d 726, 738 (3d Cir. 1976), the essence of the manufacturer's liability in a second collision case is the enhancement of the injuries. As further delineated in *Jeng v. Witters*, 452 F. Supp. 1349, 1355 (M.D. Pa. 1978), *aff'd* 591 F.2d 1335 (3d Cir. 1979) :

The term "second collision", as used in definitions of crashworthiness of a motor vehicle in products liability cases generally refers to the collision of the passenger with the interior part of the automobile *after the initial impact or collision*. . . . The principle behind the "second collision" concept is that because of the way the vehicle has been manufactured a passenger's injuries *have been aggravated unnecessarily*, and such a concept has equal applicability whether the person's second collision is with the interior of the vehicle or as in this case, the highway.

(Emphasis supplied). Here, plaintiff's injuries were not enhanced by a second impact because the only collision which occurred was between the occupant compartment of plaintiff's pickup where plaintiff was sitting and the rear of the flatbed truck which penetrated into the passenger area. Thus plaintiff's claim that the jury should not have considered the facts of the *initial* accident because liability was predicated on a second impact, is based on a confused and misleading factual premise. No matter what label appeals to plaintiff to describe the tragic event, the question of proximate cause was a proper issue in this as in most 402A cases.

Even though it is true that plaintiff was proceeding solely under a 402A strict liability theory which would preclude admitting testimony relating to his lack of due care for the *purpose* of barring or limiting recovery, it is equally true that such evidence, properly limited, is admissible for the jury's consideration on the issue of proximate cause. In determining proximate cause the jury had to decide how the accident occurred and what factors were involved. On the one hand was plaintiff's theory that the impact which brought about plaintiff's injuries was caused by the transporter truck's failure to have a rear underride guard. It was made clear in the evidence that even properly installed underride guards have a certain limit to their tolerance for resisting impacts at various speeds and other elements that make up the dynamics of rear end collisions. It was the defendant's theory that the impact resulting in injury was not caused by the absence of a rear guard. Instead it was caused by disconnection of the brakes on a heavy utility trailer plaintiff was towing and the resultant effect on the pickup's ability to stop, or more importantly, to slow to a speed that would have allowed an underride guard to have prevented the injury suffered by the plain-

tiff. It was for the jury to resolve the question of whether the lack of an underride guard was a substantial factor in bringing about plaintiff's accident. The testimony concerning disconnection of the trailer brakes was both relevant and admissible to aid the jury in making their determination. Additionally, references in plaintiff's evidence to speeds, weights, direction and the usefulness of guards made defense evidence of the speed, weight and direction of plaintiff's pickup and trailer clearly admissible.

Furthermore, the Court was very careful to instruct the jury that the testimony relating to plaintiff's conduct should be disregarded *except* to the extent it shed light on whether the lack of a guard brought about the accident. (Tr. 10-98). This instruction comported with the law, and was not objected to by plaintiff. The Court sees no merit in plaintiff's claim of error due to admission of the conduct testimony. In any event, any error the Court may have committed concerning this issue would be harmless error under Rule 61 of the Federal Rules of Civil Procedure since the jury found that defendant's product was not defective and it did not have to decide the question of proximate cause in its deliberations. Thus plaintiff is not entitled to a new trial on this ground.

D. Refusal of Plaintiff's Expert Testimony in Rebuttal

Plaintiff argues that the Court unreasonably prejudiced his case in refusing to delay the trial to allow him to call his expert, Dr. Batterman, in rebuttal. Due to a reasonable belief that defendant's evidence would take longer than it actually did, the particular witness was unavailable on the day defendant completed its case. However, even assuming Dr. Batterman had been present, the Court's ruling that the rebuttal would not be allowed would have been the same. Although the Court expressed concern

about the administration of the case, the basis of its decision was the inadequacy of plaintiff's offer of proof. After hearing argument at side-bar, the Court concluded, *and plaintiff agreed*, that the substance of the evidence proffered had already been presented in plaintiff's case in chief by a different expert, Mr. Slagle. (Tr. 9-126). As such the evidence was excludable in the Court's discretion as unnecessarily cumulative. *Bowman v. General Motors Corp.*, 427 F. Supp. 234 (E.D. Pa. 1977). Since plaintiff was not seeking to rebut the defense's presentation of an alternative theory or new facts, the Court cannot be said to have abused its discretion. See *Frankel v. Styer*, 386 F.2d 151 (3d Cir. 1967); *Olsen v. United States*, 521 F. Supp. 59 (E.D. Pa. 1981). Furthermore, if it can be said that there was error, it would be harmless error because the testimony sought to be introduced related solely to the issue of proximate cause, an issue which the jury did not have to decide due to its conclusion that the defendant's cab-chassis was not defective at the time it left defendant's hands. Fed. R. Civ. P. 61.

E. Refusal to Permit Plaintiff's Motion Picture on Underride into Evidence

Plaintiff contends that the Court erred in refusing to admit into evidence a film produced by the Insurance Institute for Highway Safety. At trial plaintiff offered the film to prove that certain underride guards being installed by truck body builders were inadequate and thus useless (Tr. 2-165). Plaintiff also felt it would be helpful for the jury to visualize what the rear underride problem entailed (Tr. 2-168). The film, entitled "Underride," showed in graphic detail the gruesome consequences of an accident involving underride. In motion slow enough to be clearly visualized, the film depicted the impact on the passenger compartment and its human cargo as a car rides under the

higher truck frame in a rear end collision. The film showed both the manner and the type of injury suffered as a result of inadequate underride protection. Still photographs of various accident scenes are disclosed, one with blood covering the driver's seat, another with deceased driver's head shoved back at an unnatural angle towards the rear of the car. Slow motion segments taken from inside a car carrying two dummy passengers reveal the horrible results of a collision into the tail end of an unguarded tractor-trailer as the bed of the truck is violently shoved into the heads of the dummies.

Extensive discussion was held between counsel and the Court, both on and off the record, as to the film's admissibility. (Tr. 2-165 to 2-177; 3-2 to 3-6). After careful consideration during the course of the trial the Court concluded that the film should be ruled inadmissible as unduly prejudicial. Fed. R. Evid. 403. See *Thomas v. C. G. Tate Construction Co., Inc.*, 465 F. Supp. 566 (D.C. S.C. 1979) (granting motion in limine). Not only was the film gory and inflammatory, it also had the implicit tendency to confuse the jury as to the real issue of the case. The question was not whether a finished truck lacking an underride guard presented a potentially hazardous condition, but rather, whether defendant's product, a cab-chassis concededly in substantially unfinished condition when sold, was defective when it left defendant's possession. Additionally, plaintiff's claim that the jury could not understand underride without seeing this film is neither persuasive nor a realistic appreciation of the level of comprehension enjoyed by persons called and accepted for jury service generally in our courts and particularly in this case. Numerous witnesses described the underride effect. Testimony over most of the ten days, diagrams, models, pictures, and hand gestures, in addition to an underride guard

testing film, were all used to explain the phenomenon. Clearly it cannot be said that the film "Underride" was necessary for the jury to perceive the physical principles of underride.

Viewing the transcript objectively the Court is firmly convinced that its original ruling was correct. The arguments presented by plaintiff in his brief on this particular evidentiary question present nothing new or different from that which was previously argued and rejected at trial. The Court thus sees no reason to grant plaintiff a new trial on this ground.

F. Expert's Report Not Allowed to be Read Either During Cross Examination or During Plaintiff's Closing

Plaintiff asserts that the Court abused its discretion in giving him contradictory instructions and thereby precluding him from reading excerpts of a statement by the Director of the Insurance Institute for Highway Safety, William Haddon. This claim is incorrect inasmuch as the instructions given were not contradictory, but only interpreted as such by plaintiff.

The report in question concerned a demonstration study by the Institute which intended to show that in certain cases, lightweight guards could be produced which had a measure of effectiveness against rear underride. The issue of allowing the report to be read to the jury first arose in the context of plaintiff's cross examination of defendant's expert, Dr. Moffat. During a jury recess used to discuss the scope of plaintiff's cross, the Court set out general guidelines for the use of documents in cross examination. (Tr. 9-31 to 9-34). The Court stated that within the limits of admissibility, statements could be read by counsel for the purpose of eliciting the witness's opinion thereon.

While cross examining Dr. Moffat, plaintiff attempted to read a portion of the study written by Mr. Had-

don and dated March 16, 1977, which set out the parameters of the Institute's undertaking. The Court interrupted counsel to discern the purpose of the reading, noting that the statement was written in 1977 whereas the vehicle which was involved in plaintiff's accident was sold six years before, in 1971. The following colloquy ensued:

MR. ANGINO: The purpose of the question was—and I will rephrase it—

THE COURT: Just ask your question rather than read because we kind of get lost in what you are doing, whether it is a predicate for a question, whether it is a question, or whatever. I won't just allow *general reading* by an attorney to a witness.

If you want to read to the jury, you can use your closing speech time for that. You can divide that time any way you want.

(Tr. 9-60) (emphasis added).

The above instruction, combined with what was said during the recess, makes clear the Court's position that counsel may not simply read statements during cross examination unless they are directly related to a question. After receiving the Court's ruling, however, plaintiff decided to take a different tack in his subsequent examination rather than pursue the contents of Mr. Haddon's study. Apparently plaintiff erroneously assumed from the Court's comment that his right to read Mr. Haddon's statement during closing argument had been automatically preserved. Such an assumption was unwarranted and any error which resulted should not be cast upon the Court. Surely, a counsel with the trial experience of plaintiff's counsel here doesn't have to have the Court explain, chapter and verse, that the right to read *anything* to a jury in summation requires that it be in evidence, a status that the Haddon re-

port never enjoyed. (Tr. 10-4). At best, the episode represents an unfortunate misinterpretation by plaintiff. The Court intended to convey that unless they could be viewed as a predicate for a question, the appropriate time for counsel's reading of lengthy documents was during summation. Since it was not clear that the reading which was attempted was in fact a prelude to a question, the Court in its discretion properly refused to allow that particular reading.

Plaintiff's confusion surfaced prior to the closings when defendant objected to the contemplated use of Mr. Haddon's report in plaintiff's argument. Plaintiff responded that the Court had previously indicated to him that he would be allowed to read the report at this time. Relying on the fundamental principle that a statement which was neither admitted into evidence nor addressed during direct testimony cannot be utilized during closing argument, the Court ruled in defendant's favor. *Draper v. Airco, Inc.*, 580 F.2d 91, 96 (3d Cir. 1978). As explained above, the ruling did not contradict the instructions given during cross examination and thus does not provide plaintiff with grounds for a new trial.

Assuming arguendo that the instructions did have a tendency to confuse resulting in error, the error engendered thereby was harmless. The report that plaintiff wished to read discussed the technical feasibility of developing a prototype guard. Even aside from the question of the report's relevancy in view of its post-accident date, it should be noted that the topic of the feasibility of designing an underride guard was not disputed by defendant and therefore was not a key issue in the case. The central question for determination was whether defendant's cab-chassis was defective when it left defendant's hands because *some* type of guard kit was not provided. Since the jury an-

swwered this question in the negative, its failure to learn the Institute's view on what type of guard could have been provided was immaterial.

G. *Court Participation in the Trial*

Plaintiff's final allegation of error is that the Court exceeded its discretion in monitoring the trial by cross examining plaintiff's witnesses and excluding testimony without objection from defense counsel. Plaintiff asserts that the excessive disruption prejudiced his case. Despite the numerous citations to the record, this claim is wholly devoid of support. Most of the citations concerned instances where the court asked questions in order to clear up ambiguities in the testimony or direct the witness's attention to the specific issues in the case. Other citations refer to instances where the Court made a brief comment, or rephrased counsel's question to prevent leading or to keep the testimony focused on matters that were relevant. On one occasion the Court precluded certain testimony as irrelevant despite defendant's statement that he did not object. (Tr. 4-5 to 4-6).

In *Garrett v. Faust*, 9 F.R.D. 482 (E.D. Pa. 1949), vacated on other grounds, 183 F.2d 625, cert. den., 340 U.S. 931, rehearing denied, 341 U.S. 917, rehearing denied, 341 U.S. 933, defendants made a similar complaint to that voiced by plaintiff in this case. In particular, the *Garrett* defendants objected to the Court's examination of the plaintiff. In denying this claim a ground for error the proper rule was admirably stated as follows:

Where a trial threatens to bog down in a morass of confusion, it is not only the right but the duty of a trial judge to lend his assistance in an attempt to preserve an orderly procedure.

Garrett v. Faust, supra, 9 F.R.D. at 486.

Here, as in *Garrett*, only this duty to preserve orderly development of the facts was exercised by the Court. In so doing, there was no abuse of judicial discretion entitling plaintiff to a new trial. After reviewing the record the Court has concluded that all its remarks were balanced and accurate and that plaintiff's claim of prejudice must be denied.

III. CONCLUSION

Upon consideration of all of plaintiff's arguments in support of his motion for judgment n.o.v. or for a new trial, the motion is denied.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action
No. 81-2712

MARK DAVID FIELD

v.

OMAHA STANDARD, INC., SAVAGE TRUCK EQUIPMENT COMPANY and INTERNATIONAL HARVESTER COMPANY

ORDER

AND NOW, TO WIT, this 23rd day of June 1983,
for the reasons stated in the foregoing Memorandum, IT
IS ORDERED that plaintiff's motion for judgment n.o.v.
or in the alternative for a new trial is hereby *denied*.

(s) Louis C. Bechtle
Louis C. Bechtle, J.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1530

FIELD, MARK DAVID,

Appellant

vs.

OMAHA STANDARD INC., SAVAGE TRUCK EQUIPMENT COMPANY, INTERNATIONAL HARVESTER COMPANY

Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil No. 81-2712)

(District Judge: Honorable Louis C. Bechtle)

Submitted Under Third Circuit Rule 12 (6)

March 5, 1984

Before: ALDISERT and HIGGINBOTHAM, *Circuit Judges*, and LATCHUM, *District Judge*.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and having concluded that *Verge v. Ford Motor Co.*, 581 F.2d 384 (3d Cir. 1978), was properly applied in the case, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

(s) Aldisert
Circuit Judge

* Honorable James L. Latchum, of the United States District Court for the District of Delaware, sitting by designation.

Attest:

(s) Sally Mrvos
Sally Mrvos, Clerk

DATED: MAR. 6, 1984

EXHIBIT C

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 83-1530

FIELD, MARK DAVID,

Appellant

vs.

OMAHA STANDARD INC., SAVAGE TRUCK EQUIPMENT COMPANY, INTERNATIONAL HARVESTER COMPANY

(E.D. Pa. Civ. No. 81-2712)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and Latchum, *District Judge*.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision

28a *Order on Rehearing, Court of Appeals*

having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

(s) Aldisert
Circuit Judge

* Honorable James L. Latchum, of the United States District Court for the District of Delaware, sitting by designation.

Dated: March 30, 1984

EXHIBIT D

Jesus Garcia VERGE and the Commissioner of Labor of
the Government of the Virgin Islands

v.

FORD MOTOR CO., Elgin-Leach Corp., Leach Co., Isla
Verde Sales, Inc. and John Doe Corp.

Appeal of FORD MOTOR CO.

No. 77-1064

United States Court of Appeals,
Third Circuit

Argued April 25, 1978

Decided Aug. 8, 1978

Before GIBBONS, GARTH and HIGGINBOTHAM,
Circuit Judges.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, Jr., Circuit Judge.

We must address, in this case, a little-litigated subtlety of products liability law: On whom to place design responsibilities where a product has been manufactured and assembled in more than one stage. Because we conclude that the Ford Motor Company was not responsible for the design defect here, we hold that the district court erred in denying Ford's Motion for Judgment n.o.v.

I.

The plaintiff, Jesus Garcia Verge, was an employee of the Government of the Virgin Island's Department of Public Works Sanitation Division. He worked on a garbage collection crew in St. Croix. On February 23, 1973, while Mr. Verge was standing at the rear of a garbage truck, a co-worker placed a full can of garbage about three feet behind him. Then the driver of the truck, without having received a signal to proceed, without checking to locate the position of Mr. Verge and the other crew members and without any warning to them, put the truck into reverse gear. Mr. Verge was pinned between the truck and the garbage can that had been left behind him. As a result of this accident, he suffered a broken leg.

Mr. Verge filed a complaint against Ford, the Elgin-Leach Corp., Leach Co., Isla Verde Sales, Inc. and John Doe Corp. alleging that his injuries were caused by the defendants in that they:

- (a) Designed, manufactured, assembled, distributed and sold the garbage truck in an unsafe condition.
- (b) Designed, manufactured, assembled, distributed and sold the garbage truck in a condition unreasonably dangerous for its intended use.
- (c) Failed to exercise reasonable care in the adoption of a safe plan or design of the garbage truck, which failure made the truck dangerous for the purposes for which it was manufactured.

[Complaint.] More specifically, it is alleged that the defendants failed:

to equip the truck with mirrors or other devices by which the operator of the truck would be able to ascertain the presence of individuals to the rear, prior

to reversing the vehicle. The defendants further failed to equip the garbage truck with an operable buzzer or other device which would warn Jesus Garcia Verge and other persons foreseeably similarly situated that the garbage truck was to be reversed.

Id. A settlement between the plaintiff and Elgin-Leach Corporation and Leach Co. was reached before trial. It does not appear from the record that service of process was ever made upon the John Doe Corporation. Neither does it appear that Isla Verde Sales, Inc. was ever made party to this action.

The case against Ford was based on Section 402A of the Restatement (2d) of Torts.¹ The jury returned a verdict of \$75,000.00 in Mr. Verge's favor. Ford moved for judgment n.o.v., the denial of which is the basis for this appeal.

¹ Restatement (2d) of Torts §402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not brought the product from or entered into any contractual relation with the seller.

II.

Plaintiff's central allegation is that Ford's cab and chassis was defective when it left Ford's hands because it did not contain a warning buzzer that would sound when the truck was put into reverse gear. Plaintiff's expert witness testified that a garbage truck without such a device is unreasonably dangerous.

[1] Any design defect case of this type involves two primary issues: (1) Was there a defect?; (2) If so, who is responsible for it? In finding for the plaintiff, the jury obviously answered the first question in the affirmative, *i.e.*, it found that the absence of a warning device on the garbage truck did render it unreasonably dangerous within the meaning of 402A. This is an issue properly submitted to the jury and we cannot say that its finding is not supported by the evidence. We confront, here, the second issue. More precisely, we must determine whether the responsibility for installing such a device should be placed solely upon the company that manufactured the cab and chassis, or solely upon the company who modified the chassis by adding the compactor unit or upon both.²

[2] This court has previously stated: "[W]e believe that the requirement that liability only be imposed where the manufacturer is responsible for the defective conditions is necessarily implicit in §402A. . ." *Taylor v. Paul O. Abbe, Inc.*, 516 F.2d 145, 147 (3d Cir. 1975).

² In order to more closely track the language of 402A the issue can be rephrased in terms of whether the truck reached the consumer without "substantial change" or whether the truck was in a "defective condition" when it left Ford's hands. Such rephrasing is, however, of little assistance in determining whether Ford should be held liable for not installing the warning device here.

Where, as here, the finished product is the result of substantial work by more than one party, we must determine responsibility for the absence of a safety device by looking primarily to at least three factors:

1. Trade Custom—at what stage is that device generally installed. See *State Stove Mfg. Co. v. Hodges*, 189 So.2d 113 (Miss. 1966), *cert. denied, sub nom. Yates v. Hodges*, 386 U.S. 912, 87 S.Ct. 860, 17 L.Ed. 2d 784 (1967); *Schipper v. Levitt and Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).

2. Relative expertise—which party is best acquainted with the design problems and safety techniques in question. Cf. *Schell v. AMF, Inc.*, 567 F.2d 1259, 1263 (3d Cir. 1977) (“The expected expertise of the manufacturer in a highly specialized field” is a factor in determining whether the manufacturer is liable for failure to install a safety device.)

3. Practicality—at what stage is installation of device most feasible. See *Taylor, supra; Bexiga v. Havar Mfg. Co.*, 60 N.J. 402, 290 A.2d 281 (1972); *State Stove Mfg. Co., supra*.

As we analyze these factors, we will remain mindful of the words of New Jersey Supreme Court Justice Nathan L. Jacobs, in *Schipper v. Levitt, supra*, 44 N.J. at 99, 207 A.2d at 330: “In developing steps towards higher consumer and user protection through higher trade morality and responsibility, the law should view trade relations realistically rather than mythically.”

Before we analyze each of these factors, in order to achieve a more realistic picture of the trade relations here, we must examine how the garbage truck here was obtained by the Virgin Islands’ Department of Public Works.

The only evidence we have on this point was provided by the deposition of David Leach, the President of Leach Co. and a director of the Elgin-Leach Corp.³ He testified that the cab and chassis are generally purchased from Ford by a dealer. The cab and chassis unit is referred to as the F-700 Model. This model is a multi-purpose vehicle that can be converted for other uses beside garbage collection. Trucks are generally driven from Ford to Leach's plant in Oshkosh, Wisconsin, by "Drive-away" companies which are hired for this purpose. The trucks are accompanied by bills of lading prepared by the manufacturer. They contain Leach's address and are signed by Leach after it inspects the vehicle for damage. The bill of lading for the particular truck involved in the accident here was never entered into evidence. In fact, no documentation relating to any garbage trucks was ever entered into evidence.

When Leach receives the cabs and chassis, it converts them into garbage trucks. This conversion process involves cutting from four to six feet from the chassis, placing the compactor unit onto the chassis and making certain electrical hook-ups.

Leach bills the purchaser of the truck for the compactor unit and the assembly of the unit to the truck. Leach, except for rare occasions, does not itself purchase the trucks. After conversion the truck is shipped to a dealer or ultimate customer.

Leach disclaimed any personal knowledge of how the truck in question got to the Oshkosh plant. He believed that the purchaser of the truck was the Puerto Rico Iron Works which he believed to be a Ford truck dealer.

³ This deposition was read into evidence at the trial.

We will now examine what the record here reveals as to each of the three factors already delineated as crucial to our analysis.

1. TRADE CUSTOM

[3] Plaintiff's counsel specifically asked plaintiff's expert witness whether it was the trade custom that the warning device be installed by the company that manufactured the cab and chassis or by the company that installed the compactor units onto the chassis. Unfortunately, the expert's reply did not answer the question and, when the subject was raised again on cross-examination, no clear answer emerged.⁴

⁴ The following is the text of the question asked plaintiff's expert, Mr. Cline, by plaintiff's counsel, Mr. Spencer, and the ensuing cross-examination on this issue by defendant's counsel, by Mr. Hymes:

Mr. Spencer: Do you know whether or not back in 1970 or 1971, what the custom in the industry was, with respect to the installation of these devices? In other words, those that did it, did the manufacturer of the frame do it, or did the body builders do it?

Mr. Cline: From my knowledge, the orders for such trucks would be placed with the truck sales agency, who would then supply the truck with the type of body, the compactor body that was specified, along with any alarm devices which were required.

Mr. Spencer: All right, thank you, Mr. Cline.

Mr. Hymes: Mr. Cline, I had a little difficulty hearing your last answer. Did I understand you to say that in 1970, that the order for such a device as this, would come from the sales agency?

Mr. Cline: It was my, I meant to imply that the order for such a alarm would be placed with a sales agency selling trucks.

The only other evidence pertaining to this issue comes from the testimony of David Leach. He testified that his company has installed safety devices, but only when the order from the purchasing agent specifically requested the installation of such a device. Mr. Leach went on to say that such a device is generally installed by the truck manufacturer. Mr. Leach testified, however, only as to his company's experience. There is no evidence of whether his company's experience was shared by the garbage truck industry as a whole, or even of how substantial is Leach's share of that industry. Therefore, Mr. Leach's testimony is not an adequate basis for determining the trade custom in this regard.

2. EXPERTISE

Since the record is without persuasive evidence of trade custom, we must proceed to analyze the other two factors. The evidence relating to comparative expertise indicates that Leach is more expert than Ford in the design of refuse collection vehicles. David Leach testified

Mr. Hymes: And the person that wants to buy it tells the sales agency what he wants on his compacting unit?

Mr. Cline: He will give him size compactor that he will require for his needs, and any other special equipment he might want on it.

Mr. Hymes: And included among the special equipment would be a device such as that?

Mr. Cline: I don't consider this a special equipment, because it fills a need. When you speak of compactors you have an inherent need for backup alarm device, which has been recognized for many, many years.

Mr. Hymes: Well, in 1970 was such a device like this standard equipment in the industry, on this type of vehicle?

Mr. Cline: I haven't made a survey to know whether it is, but it comes with every vehicle that is sold.

that his company does install warning devices. He also testified that his company has been in the garbage collection vehicle business since 1932 and has installed compactor units on hundreds of trucks each year since at least 1954. Except for an unrelated hand tool business, Leach is involved solely in the manufacture and installation of compactor units. There was no testimony relating to Ford's expertise in the design of garbage collection vehicles. There is no evidence that Ford ever installed a warning device of the type in question. There is not even any direct evidence that Ford was aware that any of its F-700 trucks was being converted into refuse collection vehicles. Thus the evidence indicates that Leach is considerably more expert in the design of garbage trucks than is Ford.

3. PRACTICALITY

Finally it is clear from the record that it is considerably more practical for warning devices to be installed by Leach rather than by Ford. It is essential to recognize that, by the testimony of plaintiff's own expert witness, the Ford cab and chassis was a multi-purpose vehicle. As such, the topless chassis could be modified for a number of uses that would require no backup buzzer. Thus, if a flat bed were added that allowed unobstructed rear vision, it is difficult to conceive of a legal basis for finding that the absence of a warning device would constitute a design defect. Similarly, if a body were added that was lower than the rear view window or if a body were added that otherwise allowed adequate rear vision, there would be no basis for finding that a design defect was present because of the failure to incorporate a backup buzzer. Thus, we are dealing with a vehicle that was not inherently defective when manufactured, but that became defective solely because of additions made by a company with decades

of experience in accomplishing just this type of modification.

A similar situation was addressed in *Bexiga v. Haver Manufacturing Corp.*, *supra*. There, the trial court and intermediate appellate court had held that the manufacturer of a punch press was not liable for the failure to install a safety device because the machine could perform various tasks and it would be impractical for the manufacturer to install different safety devices for each separate use. The Supreme Court of New Jersey, however, concluded that there was evidence from which the jury could have found that one safety device could be installed for all uses of the machine. Therefore the court held that the trial judge had erred in dismissing the action at the close of the plaintiff's case. The court stated:

Where a manufacturer places into the channels of trade a finished product which can be put to use and which should be provided with safety devices because without such it creates an unreasonable risk of harm, and where such safety devices can feasibly be installed by the manufacturer, the fact that he expects that someone else will install such devices should not immunize him.

Bexiga, supra, 60 N.J. at 410, 290 A.2d at 285.⁵ Here, however, the evidence is that it would not be feasible to install the safety device in question on all F-700 trucks. Furthermore, there was no evidence that it would be feasible for Ford to determine which trucks were to be converted for refuse collection use. As mentioned, there is no direct evidence that Ford was even aware that the truck

⁵ Although the court in *Bexiga*, seems to distinguish between strict liability and negligence liability for product design, we do not consider the distinction of significance in this context.

in question or any F-700 truck would be used for refuse collection. Since Ford manufactures the F-700 for a variety of uses and Leach's conversion business is solely concerned with garbage trucks, it seems much more practical for Leach to install the warning device. *Cf. State Stove, supra* (more practical for plumber to install safety appliance on water heater than for manufacturer held not liable); *Schipper v. Levitt, supra* (similar facts and result).⁶

III.

[4] Thus the evidence in this case shows that Leach is more expert in garbage vehicle design than Ford and that it would be more practical for Leach to install the warning device rather than for Ford to do so. On the facts of this case, plaintiff failed to prove that it was practical for Ford to install such a warning device on all of its vehicles when such a device would not be required for many uses of the vehicle. We recognize there might be different factual situations where a manufacturer could be obligated to install certain devices that have a limited use, but we, under the facts of this case, hold that plaintiff has failed to bring forth proof sufficient to warrant the imposition of liability on Ford. As in *Taylor, supra*, 516 F.2d at 149, "There is no dispute in this case with respect to the critical facts, and thus the only issue before us is the legal significance of those facts." We hold that Ford was not responsible for including a backup warning device or other safety device on the F-700 cab and chassis here and is not liable for injuries caused by the absence of such a device. Thus,

⁶ We do not suggest that Ford could not foresee that its F-700 chassis would be converted for use as a garbage truck. We emphasize only that Leach was in a much better position than Ford to incorporate the safety features necessitated by such a use.

the district court erred in denying Ford's motion for judgment n.o.v.⁷

The judgment of the district court will be reversed with instructions to grant the judgment n.o.v. in favor of Ford.

⁷ On appeal, Ford also argued that the district court erred in (1) not submitting the issue of assumption of risk to the jury, and (2) failing to submit to the jury special interrogatories in order to ascertain the comparative responsibility of each defendant, pursuant to an extension to product liability cases of the doctrines of *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1967), codified at 5 V.I.C. §1451 (1973). Given our disposition of the case, we do not reach these issues.



In The

Supreme Court of the United StatesALEXANDER L. STEVENS,
CLERK

October Term, 1983

MARK DAVID FIELD,

Petitioner,

vs.

OMAHA STANDARD INC., SAVAGE TRUCK EQUIPMENT
COMPANY, INTERNATIONAL HARVESTER COMPANY,*Respondents.**On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Third Circuit*

**BRIEF IN OPPOSITION OF RESPONDENT
INTERNATIONAL HARVESTER COMPANY**

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QUESTION PRESENTED

Whether the trial and appellate courts correctly applied the decisional law of Pennsylvania to the facts of the case presented in this diversity action in order to allow the jury properly to determine responsibility for an alleged defect existing in a product manufactured in stages by more than one entity?

TABLE OF CONTENTS

	<i>Page</i>
Question Presented	i
Table of Contents	ii
Table of Citations.....	ii
Statement of the Case	2
Summary of Argument	4
Argument	5
Conclusion	10

TABLE OF CITATIONS

Cases Cited:

Azzarello v. Black Brothers Co. Inc., 480 Pa. 547, 391 A.2d 1020 (1978)	6, 8, 9
Bailey v. Atlas Powder Co., 602 F.2d 585 (3d Cir. 1979)	8
Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (1956)	8
Burch v. Sears Roebuck and Co., 467 A.2d 615 (Pa. Super. 1983)	6
Christner v. E.W. Bliss Company, 524 F. Supp. 48 (E.D. Pa. 1981)	6

Contents

	<i>Page</i>
Elliott v. Century Chevrolet Co., 597 S.W. 2d 563 (Tex. Civ. App. 1980)	6
Ford v. International Harvester Co., 430 So. 2d 912 (Fla. App. 3 Dist. 1983)	6
Hammond v. International Harvester Co., 691 F.2d 646 (3d Cir. 1982)	8
Heckman v. The Federal Press Company, 587 F.2d 612 (3d Cir. 1978)	5
Mayberry v. Akron Rubber Machinery Corporation, 483 F. Supp. 407 (N.D. Okla. 1979)	6
Merriweather v. E.W. Bliss Co., 636 F.2d 42 (3d Cir. 1980)	8
Michalko v. Cooke Color and Chemical Corp., 91 N.J. 386, 451 A.2d 179 (1982)	5
Mott v. Callahan Ams Machine Co., 174 N.J. Super. 202, 416 A.2d 57 (1980)	5
Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983)	8
Orion Insurance Company, Ltd. v. United Technologies Corp., 502 F. Supp. 173 (E.D. Pa. 1980)	6
Powell v. E.W. Bliss Company, 529 F. Supp. 48 (E.D. Pa. 1981)	6

Contents

	<i>Page</i>
Sherk v. Daisy Hedden, 498 Pa. 594, 450 A.2d 615 (1982)	8, 9
Verge v. Ford Motor Company, 581 F.2d 384 (3d Cir. 1978)	5, 6, 7, 8, 10

Other Authorities Cited:

49 C.F.R. §393.86	9
§402A of the Restatement (Second) of the Law of Torts	4, 5, 6, 8

No. 83-1985

In The

Supreme Court of the United States

October Term, 1983

MARK DAVID FIELD,

Petitioner,

vs.

OMAHA STANDARD INC., SAVAGE TRUCK EQUIPMENT
COMPANY, INTERNATIONAL HARVESTER COMPANY,

Respondents.

*On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Third Circuit*

BRIEF IN OPPOSITION OF RESPONDENT INTERNATIONAL HARVESTER COMPANY

International Harvester Company respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 6, 1984.

STATEMENT OF THE CASE

This action arose out of a motor vehicle accident occurring in Pennsylvania in July of 1979. One of the vehicles involved in the accident was a mobile crane, or crane truck, originally purchased in 1971 as an off-the-road construction vehicle. The accident occurred when petitioner, Mark David Field, drove a pick-up truck into the rear of the crane truck while the latter was stopped on the highway waiting to make a left hand turn.

Mr. Field alleged that the injuries he sustained were caused by the crane truck. In particular, he claimed that it should have been equipped with a device to protect against rear underride, a term generally used to describe a collision in which the front end of the striking vehicle rides under the body of the struck vehicle. As a result, the striking vehicle sustains an impact to its windshield and roof area and an intrusion into its occupant compartment.

The base of the crane truck was a cab and chassis manufactured by International Harvester Company, respondent herein. A cab and chassis is nothing more than a motorized frame. In addition to the truck cab, it consists only of frame rails, a drive shaft, a rear axle, and wheels. Until a truck body is placed upon it, a cab and chassis is considered an incomplete vehicle and may not be driven on the public highways. This particular unit was sold to Troy's, Inc., a franchised but independent International Harvester dealer in Parkton, Maryland. Thereafter, Troy's completed the truck to order of its customer, Ryland Systems, by having other local business entities modify the frame (by lengthening the rails and drive shaft and moving the axle and wheel assemblies further rearward), install a truck body, and erect

a crane on it. Troy's then sold the completed vehicle to Ryland Systems.¹

Mr. Field contends that International Harvester should be held accountable for the final configuration of the vehicle in spite of its limited role as the supplier of the cab and chassis unit. According to the expert witness who testified at trial on Mr. Field's behalf, International Harvester should have offered an underride guard kit as optional equipment to be purchased with the cab and chassis.²

In its defense, International Harvester introduced evidence to explain the manner in which large trucks are manufactured. Thus counsel elicited testimony to the effect that a cab and chassis is a multi-purpose component which can and does form the base for any number of truck configurations, such as trash collectors or beverage trucks. Because the vehicle bodies for many of those configurations extend to the level of the rear axle or lower, a specific component for protection against rear underride is often incompatible with and unsuitable for the vehicle. Typically, as was the case herein, the cab and chassis manufacturer is not aware of the planned end use for the vehicle. As a result, it is not in a position to know whether an underride guard would serve any purpose, or whether it might interfere in the function of the vehicle, as for example in the case of a garbage truck. Thus, the custom and practice developed in the trucking industry is for the final

1. Neither Troy's nor Ryland Systems was made a party to the litigation.

2. Interestingly, the availability of such an option would have had no bearing on subsequent events. Chester Troy, the principal owner of Troy's and the individual involved in the 1971 transaction, was also a witness for the plaintiff. He testified, however, that he would not have recommended that Ryland purchase an underride guard as it would have interfered with the vehicle's off-the-road use.

stage manufacturer, the body builder, to provide underride protection, equipping the vehicle with a separate component when necessary.

After ten days of trial the jury returned a verdict in favor of International Harvester, stating in response to a special interrogatory that the product in question was not in a defective condition at the time it left the defendant's possession and control. Post trial motions were denied, and the Court of Appeals affirmed.

SUMMARY OF ARGUMENT

This diversity action is one in which the district court applied legal principles developed in Pennsylvania decisional law interpreting §402A of the Restatement (Second) of the Law of Torts. Neither did the court disregard precedent nor is its decision in conflict with any other cases involving the application of Pennsylvania law.

The decisions below of the District Court for the Eastern District of Pennsylvania and the Third Circuit Court of Appeals, which courts are not unfamiliar with the development and application of product liability law in Pennsylvania jurisprudence, provided for the proper presentation of the relevant issues to the jury whose decision should not now be disturbed.

ARGUMENT

The crux of petitioner's position is that the United States District Court for the Eastern District of Pennsylvania and the Third Circuit Court of Appeals erred in deciding that *Verge v. Ford Motor Company*, 581 F.2d 384 (3d Cir. 1978), is properly to be accorded precedential value in the case *sub judice*. Petitioner's dual claim is that *Verge* misapplies the principles of §402A of the Restatement (Second) of the Law of Torts (1965) in general (Petition at 11 ff.) and that *Verge* is contrary to the law of product liability as expressed in Pennsylvania appellate decisions, in particular (Petition at 30 ff.). Neither of these positions is supportable. Rather, a review of the development of product liability law in Pennsylvania and of the authorities cited by petitioner suggests that *Verge* is in keeping with the basic tort principles underlying the cornerstone of product liability as expressed in §402A of the Restatement.

Petitioner's contention that "New Jersey Cases have considered *Verge* and have decided *not* to follow it" (Petition at 27), is not accurate. In *Michalko v. Cooke Color and Chemical Corp.*, 91 N.J. 386, 451 A.2d 179 (1982), the Supreme Court of New Jersey did, indeed, distinguish *Verge* on its facts. However, the court did not signify any disapproval of *Verge* in so doing. Such is to be expected in cases involving various factual situations and distinctions which need be treated individually. In fact, the Third Circuit itself has distinguished *Verge* on its facts. Cf. *Heckman v. The Federal Press Company*, 587 F.2d 612 (3d Cir. 1978). Moreover, the reasoning employed by the Third Circuit Court of Appeals in *Verge* was relied upon by the Superior Court of New Jersey in *Mott v. Callahan Arms Machine Co.*, 174 N.J. Super. 202, 416 A.2d 57 (1980).

While it is significant that no court of any jurisdiction has questioned the propriety of the holding and analysis employed

in *Verge*,³ the jurisdiction with which we are particularly concerned is Pennsylvania. There, the Pennsylvania Superior Court referred to *Verge*, though briefly, in a favorable manner. *Burch v. Sears Roebuck and Co.*, 467 A.2d 615, 622 (Pa. Super. 1983). Since the Pennsylvania appellate court specifically made mention of the *Verge* decision without disapproving it, petitioner's contention that "Verge has already been inferentially reversed by the Superior Court in *Burch*" (Petition at 39) is erroneous and wholly unfounded.

The concept which petitioner finds so unjust is a simple equality between responsibility for the existence of a defect and responsibility for the injuries allegedly resulting from it. Nothing in §402A or in the decisions adopting and relying upon it can be said to deviate from that fundamental precept. All of the opinions quoted by petitioner, which contain broad references to liability of all suppliers of a defective product, were rendered in cases involving a product manufactured in a single stage. Petitioner's reliance upon them misses the central point in this case. The jury concluded that the product manufactured by International Harvester, *i.e.*, the cab and chassis unit, was not defective. In the language of *Azzarello v. Black Brothers Co. Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978), the first opinion to contain the jury instruction now standard in Pennsylvania products actions, the cab and chassis did not lack an element necessary to make it safe for use, in this case rear underride protection.

3. The reasoning and analysis employed in *Verge* has, in fact, been relied upon in several cases both within the federal court system, *see Powell v. E.W. Bliss Company*, 529 F. Supp. 48 (E.D. Pa. 1981); *Christner v. E.W. Bliss Company*, 524 F. Supp. 1122 (M.D. Pa. 1981); *Orion Insurance Company, Ltd. v. United Technologies Corp.*, 502 F. Supp. 173 (E.D. Pa. 1980); *Mayberry v. Akron Rubber Machinery Corporation*, 483 F. Supp. 407 (N.D. Okla. 1979), and in the courts of other states, in addition to Pennsylvania and New Jersey. *See Ford v. International Harvester Co.*, 430 So. 2d 912 (Fla. App. 3 Dist. 1983); *Elliott v. Century Chevrolet Co.*, 597 S.W. 2d 563 (Tex. Civ. App. 1980).

It seems fairly obvious that in order to make that determination the jury needed some basic information, such as the customary method of manufacturing large trucks, the relative expertise of the entities involved in the various stages of manufacture, and the practicality of attaching underride protection at any one particular stage. Those are of course the very factors enunciated by the Court of Appeals in *Verge* and followed by the trial court here. That sensible approach to the problem is said by petitioner to be contrary to Pennsylvania law. It is his position that the focus of the inquiry should not be the condition of the product at the time of its manufacture. It should instead be limited to whether the vehicle was in a defective condition at the time of the accident. Under petitioner's version of the law, an affirmative response to that question imposes liability upon every entity which supplied a component part of the product, regardless of that component's role in producing the injury.*

Petitioner attempts to portray the district court and Court of Appeals as violating a long line of cases which require federal courts, sitting in diversity cases, to follow the substantive law of the states (Petition at 8 ff.). It is clear, however, that the case herein presented involves nothing more than an application of the law of product liability as such currently exists in Pennsylvania. As the precise factual situation has not specifically been addressed by the Pennsylvania Supreme Court, it represents one in which the federal courts must use a measure of predictive interpretation of the outcome had the same factual situation been presented

4. Any attempt to limit the group of potentially liable component suppliers in a case such as this one where an allegedly necessary safety device is lacking would inevitably result in a discussion of negligence concepts. That is considered anathema to plaintiffs in products litigation, and in this action would all but defeat petitioner's claim for damages, resulting as they did from injuries he caused to himself.

in the state courts.⁵ The district courts and the Third Circuit Court of Appeals, sitting in Pennsylvania, are at least as well equipped to do this as is any other federal court, having been faced with this task on numerous occasions.⁶

Petitioner's rather bold statement that "no court could presume that the instant makeup of the Supreme Court would apply a *Verge* type analysis to the instant case"⁷ is itself quite presumptuous. It should be pointed out that of the seven justices who decided *Azzarello v. Black Brothers*, considered the most liberal Pennsylvania decision attempting to interpret §402A, only one now remains on the Pennsylvania Supreme Court. And in the five years since *Azzarello* was decided, that court's most significant decision in the area of products liability has been *Sherk*

5. Cf. *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 204, 76 S. Ct. 273, 277, 100 L. Ed. 199 (1956); *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896-97 (3d Cir. 1983).

6. See, e.g., *Hammond v. International Harvester Co.*, 691 F.2d 646 (3d Cir. 1982); *Merriweather v. E.W. Bliss Co.*, 636 F.2d 42 (3d Cir. 1980); *Bailey v. Atlas Powder Co.*, 602 F.2d 585 (3d Cir. 1979). Apropos of which Your Honorable Court has noted as follows:

"Since the federal judge making those findings is from the Vermont Bar, we give special weight to his statement of what the Vermont law is."

Bernhardt, note 5, *supra*, at 204, 76 S. Ct. at 277. In the case *sub judice*, the Third Circuit Court of Appeals sits in Philadelphia, Pennsylvania, as does the District Court for the Eastern District of Pennsylvania. The district judge who decided the case, Louis C. Bechtle, is from the Pennsylvania bar, as is A. Leon Higginbotham, Jr., the author of *Verge* who also sat on the appellate panel in this case.

7. Petition at 30 (emphasis deleted).

v. *Daisy Hedden*, 498 Pa. 594, 450 A.2d 615 (1982), one which can hardly be said to have expressed a plaintiff's viewpoint, resulting as it did in the entry of judgment for the defendant as a matter of law. Even the dissent in *Sherk* criticized *Azzarello*.

Finally, petitioner's attempt to characterize this case as involving a federal question of some significance is groundless. The Interstate Commerce Commission regulation requiring rear underride protection on certain types of vehicles has been in effect more than thirty years.⁸ There is no evidence either of record or otherwise to suggest that the regulation has been ineffective or that truck manufacturers are acting to circumvent it. Petitioner's allegations are therefore without factual basis, and have no relevance whatsoever to the matter at issue.

8. 49 C.F.R. §393.86, quoted in full by petitioner (Petition at 2-3).

CONCLUSION

In sum, this action does not involve an issue of general significance or one on which there is a split among the federal and/or state appellate courts. Petitioner's assertions to the contrary notwithstanding, the six years since the *Verge* decision have not seen an end to products liability. Far from sharing plaintiff's view of impending doom, those courts which have considered a factual situation similar to the one presented here have found the *Verge* approach to the problem a sensible and rational one.⁹ This Court should not therefore exercise its jurisdiction to review the decision by the Court of Appeals.

Respectfully submitted,

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9. The *Verge* analysis has been applied by courts within the Tenth Circuit of the federal system and by courts within the States of Florida, New Jersey and Texas. See footnote 3, *supra*, and accompanying text.